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No. _____

In The

Supreme Court of the United States

MICHAEL A. CAMPBELL,

Petitioner,

v.

JOHN HANCOCK FINANCIAL SERVICES, INC., JOHN HANCOCK LIFE INSURANCE CO., and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There are four questions presented. The first two questions are also presented in separate, related Petitions For Certiorari filed with the Court on April 21, 2003 in *Tancredi v. Metropolitan Life Ins. Co.*, No. 02-1542, and *Gayman v. Principal Financial Servs., Inc.*, 02-1551. *Tancredi, Gayman* and this Petition all involve a statutory conversion of a mutual life insurance company to a stock company. The third question presents a circuit conflict with respect to this Court's decision in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The fourth question appears to be presented in *Dow Chemical v. Stephenson,* No. 02-271, which was orally argued on February 26, 2003. The questions presented are:

1. In connection with the statutory conversion of John Hancock Mutual Life Insurance Company from a mutual to a stock company, could the Fifth Circuit disregard as outdated the law in *Phillips Petroleum Company v. Jenkins*, 297 U.S. 629, 634-35 (1936), which sets forth the rule that the Takings Clause and Contracts Clause prohibit the use of a state's reserved power "to take property without just compensation . . . or to destroy or impair any vested property right."?

2. Does the *per se* Takings Clause analysis of *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003) apply when, as here, a private actor (a mutual insurer) exercises the state's reserved power to force the owners of property (the mutual policyholders) to relinquish their property rights in a forced sale under a state conversion law,

QUESTIONS PRESENTED – Continued

where the mutual insurer otherwise lacked the contractual right to take the mutual policyholders' property?

3. In a *per se* Fifth Amendment Takings case, has the property owner satisfied this Court's *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985) ripeness tests when suit is filed after the state has made a final determination of the value of the taken property under the procedure enacted by the state, as held by the Fourth and Sixth Circuits, or must the owner also pursue all potential state court judicial remedies as held by the Fifth Circuit below as well as the First and Seventh Circuits? *Contrast Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000) and *Montgomery v. Carter County, Tennessee*, 226 F.3d 758, 765 (6th Cir. 2000) (both holding that *Williamson* provides a "finality rule" not an "exhaustion of all state remedies rule") with the lower court's decision holding that "exhaustion of all potential state judicial remedies" is required and *Deniz v. Municipality of Guaynabo,* 285 F.3d 142, 146 (1st Cir. 2001) and *Daniels v. Area Plan Commission Of Allen County*, 306 F.3d 445, 453 (7th Cir. 2002).

4. Did the Fifth Circuit disregard *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), in holding that a judgment in a state court class action barred Petitioner (an absent class member in the state court action) from litigating his Takings Clause monetary claims in federal court where the state court class action was not certified, no determination of adequate representation was made,

QUESTIONS PRESENTED – Continued

notice was not provided, an opportunity to opt-out of the state court class was not afforded and where the state court class action was dismissed without reaching the merits?

PARTIES

Petitioner, Michael A. Campbell, was a participating policyholder of John Hancock Mutual Life Insurance Co.

Respondents are John Hancock Financial Services, Inc., John Hancock Life Insurance Co., and John Hancock Mutual Life Insurance Company.

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OPINIONS BELOW

The Fifth Circuit Court of Appeals affirmed by order without opinion under Fifth Circuit local rule 47.6, which allows the court to affirm without opinion where no reversible error of law appears in the lower court's decision. Appendix A. The order of the Fifth Circuit (Appendix A) is unreported. The opinion of the district court (Appendix B) is unreported.

JURISDICTION

The court of appeals' judgment was entered on February 13, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Takings Clause of the Fifth Amendment, U.S. Const. amend. V, provides: "nor shall private property be taken for public use, without just compensation."

2. 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States.... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...."

3. The Contract Impairment Clause of Article I of the Constitution, U.S. Const. art. I, § 10, provides: "No

state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ."

4. Mass. Gen. Laws Ch. 155, § 3 provides: "All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them." Appendix E.

5. Mass. Gen. Laws Ch. 175, § 19E, "Conversion From Mutual Company to Stock Company." Appendix F.

STATEMENT OF THE CASE

In 1862, the Commonwealth of Massachusetts (the "State") granted a charter authorizing John Hancock Mutual Life Insurance Company ("Hancock") to operate as a "mutual life insurance company." App. 47. Hancock issued and delivered insurance contracts on a "mutual basis" for 138 years, premised upon the expectation that it would operate as a mutual life insurance company, including to Petitioner and other "Members." App. 47.

Pursuant to its reserved power, Mass. Gen. Laws Ch. 155, § 3 (Appendix E), the State enacted a law authorizing domestic mutual life insurance companies to convert to stock life companies in 1991. Mass. Gen. Laws Ch. 175, § 19E (the "Conversion Law"). Appendix F. On August 31, 1999, Hancock's Board adopted a Plan of Reorganization (the "Plan") and sought approval pursuant to the Conversion Law. App. 79. The Plan proposed to convert Hancock from a mutual insurer to a stock life insurer with a parent stock holding company, John Hancock Financial Services, Inc. ("JHFS"). The Plan proposed to pay cash, policy

credits or common stock in JHFS to its policyholders ("Members") in exchange for their membership interests. App. 105-106. A hearing was held, but policyholders were not permitted to intervene in the proceedings. App. 81. A policyholder vote was held, in which less than 25% of Hancock's approximately three million members participated, with a majority of those voting in favor. App. 89. On December 9, 1999, the State's Commissioner of the Department of Insurance approved the Plan. Appendix H. The Plan was implemented in January of 2000 when JHFS conducted an IPO.[1]

On February 6, 2001, Petitioner filed a Complaint in federal district court, seeking damages, pursuant to 42 U.S.C. § 1983, by reason of the conversion. Appendix G. The Complaint alleges that, because Hancock obtained State authorization and power to take Members' contracts, Hancock's conduct was "state action" that deprived Members of rights secured by the Takings Clause (Counts I-II) and the Contracts Clause (Counts III-V). App. 53-56. The Complaint alleges that Hancock took their property pursuant to the Commissioner's authority and that compensation determined or approved by the Commissioner in

[1] Prior to the effective date, Thomas Tierney, a Hancock policyholder, filed a class action complaint in Massachusetts Superior Court, on behalf of himself and all similarly situated policyholders. Appendix I. The action sought judicial review of the Commissioner's approval of the plan, alleging that it constituted a taking of property without just compensation, and alleged additional claims for contractual damages. App. 133. The Superior Court dismissed the class action complaint pursuant to Mass. R. Civ. P. 12. App. 134, 152.

her decision did not constitute just compensation. App. 57-64.

On March 14, 2001, the district court entered a decision granting Defendants' Motion To Dismiss pursuant to Fed.R.Civ.P. 12(b). Appendix B. The District Court reasoned that Plaintiff's claims were not viable because he had failed to "pursue the remedies available to him through the state courts," or on alternative grounds, "if Plaintiff is considered part of the *Tierney* state court action, Plaintiff is precluded from relitigating those claims on the principles of *res judicata* or collateral estoppel." App. 9-16. The District Court, citing *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30 (1888), further ruled that the Contracts Clause claims failed because "actions of administrative or executive officials, private corporations, and individuals, even when applying state law, do not violate the Contracts Clause." App. 19. The court of appeals affirmed. Appendix A.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a conflict of authority among federal courts of appeal with decisions of this Court under the Takings Clause. These issues affect the property rights of tens of millions of mutual life insurance policyholders whose ownership in mutual life insurers, it is alleged, have been taken through the operation of recently enacted state statutory conversion laws.

This Court has long held that the protections of the Takings and Contracts Clauses prevent a corporation from using state "reserved power" to take the contracts made by the corporation with private parties without just compensation in order to alter or amend the form and powers of the corporation. *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629 (1936) and *Coombes v. Getz*, 285 U.S. 434 (1932). The Sixth Circuit applied this constitutional limitation in *Ohio State Life Ins. Co. v. Clark*, 274 F.2d 771 (6th Cir. 1960).

However, the Fifth Circuit implicitly followed the Seventh Circuit in *Gayman v. Principal Financial Servs., Inc.*, 311 F.3d 851 (7th Cir. 2002), and the Second Circuit in *Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308 (2nd Cir. 2003), concluding that these constitutional limitations no longer apply.[2] *Phillips Petroleum* and *Coombes* have not been overruled by this Court and, therefore, continue to provide the applicable rules of decision. Only this Court may overrule its precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

A mutual insurer who utilizes state reserved power in a statutory conversion to forcibly take property (here the mutual life insurance contracts), in order to effectuate the conversion, engages in a *per se* Taking within the meaning of *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003). The lower courts' refusal to apply this Court's *per se* Takings analysis conflicts with *Brown*.

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[2] The Fifth Circuit's summary affirmance on February 13, 2003, was entered after the decisions in *Tancredi* and *Gayman*.

The decision of the court below further conflicts with this Court's ripeness rule of "finality" as stated in *Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) ("*Williamson*"), which is correctly interpreted in the Fourth and Sixth Circuits. Under this "finality" rule, a *per se* Takings claim is ripe when the government has exercised the Taking and finally determined the value, if any, to be paid. *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000) and *Montgomery v. Carter County*, 226 F.3d 758, 765 (6th Cir. 2000). However, the Fifth Circuit below, as well as the First and Seventh Circuits, construe *Williamson* to further require the "exhaustion of all state remedies" in order to recover any monetary losses stemming from a state authorized taking. *See Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 146 (1st Cir. 2001) and *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445, 453 (7th Cir. 2002).

The constitutional questions presented affect the property rights of tens of millions of policyholders of Hancock and other companies. The growth of mutual life insurance has been exponential since the first mutual company was formed in 1843. Hansman, *The Organization of Insurance Companies, Journal of Law, Economics and Organization*, Vol. 1, No. 1, p. 134 (Fall 1985). Until recently, the mutual was a predominant form of corporate organization in the life insurance industry. By the end of 1999, thirty-six percent of all life insurance policies nationwide were held in mutual insurance companies, which are owned by the policyholders. *See* Smallenberger, *Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process*, 49 Drake L. Rev. 513, 517 (2001).

The mutual form of corporate organization, however, is in the process of being dismantled through statutory conversions. Within the last twenty years, many states, including Massachusetts, have enacted new laws, or amended existing laws, authorizing procedures by which mutual life insurance companies may convert to stock life companies. *See* Racz, *No Longer Your Piece of the Rock: The Silent Reorganization of Mutual Life Insurance Companies*, 73 N.Y.U. L. Rev. 999, 1102-1103 (June 1998). Forty-five states presently have some form of mutual statutory conversion law. Smallenberger, *supra* at 526-527. Numerous mutual insurers have already demutualized, and most, if not all, of the others are expected to follow suit using these statutes. *Id.* at 517.

I. The Lower Court's Decision Is In Direct Conflict With *Phillips Petroleum*

A. *Phillips Petroleum* Requires Application Of The Takings And Contracts Clauses To A Corporate Reorganization Utilizing A State's Reserved Power

This Court in *Phillips Petroleum*, 297 U.S. at 634-35, again restated that the use of state authority enabling a change in corporate form under a state's reserved power is limited by the Takings Clause and Contracts Clause of the United States Constitution:

> The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, *or to take property without just compensation . . . or to destroy or impair any vested property right.*

(emphasis added); *see also Id.* at 536 n.5 (listing cases applying this rule) and *Coombes v. Getz*, 285 U.S. 434, 441-42 (1932) ("The authority of a state under the so-called reserved power is wide; but is not unlimited ... the interrelations of state, corporation, and stockholders may be changed; but neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired.") (citations omitted). This rule derives from *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L.Ed. 629 (1819), which held that a state's charter creates a public contract protected by the Contracts Clause. As a result of *Dartmouth College,* many states adopted provisions, as did Massachusetts, reserving the power to alter, amend or repeal corporate charters. *Looker v. Maynard*, 179 U.S. 46, 51 (1900). By enactment of this "reserved power," the state "contractually" reserved the right to subsequently amend a charter because the "reserved power" would then be implied by law in all corporate charters.

This Court, however, also recognized that the reserved power to alter or amend charters is not absolute, and is limited only to the extent it "will not defeat or substantially impair the object of the grant, or any right vested under the grant . . . ." *Phillips Petroleum*, 297 U.S. at 635; *Looker*, 179 U.S. at 52. *Cf., Polk v. Mutual Reserve Fund*, 207 U.S. 310, 325-26 (1907) (holding that where the legislature does not change the essential character of the charter, alteration is proper); *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U.S. 657, 663-34 (1904) (same). Thus, the Takings Clause and Contracts Clause apply to the exercise of reserved power when a change in corporate form would destroy contracts made by the corporation. Even then, the state power of eminent domain must be used to accomplish

the change, provided, of course, that just compensation is paid. *See West River Bridge Co. v. Dix*, 47 U.S. 507, 531 (1848) ("No state, it is declared, shall pass any law impairing the obligation of contracts; yet . . . in every political sovereign community there inheres necessarily the right and the duty of . . . protecting and promoting the interests and welfare of the community at large. . . . This power . . . denominated the '*eminent domain*' of the State is paramount to all private rights vested . . .") (emphasis in original).[3]

The Sixth Circuit in *Ohio State Life Insurance Co. v. Clark*, 274 F.2d 771 (6th Cir. 1960), correctly applied the case law of this Court. In *Ohio State Life*, an attempt was made to alter the charter of an insurance company in a way that would have destroyed the rights of certain "mutual plan policyholders" to the surplus. *Ohio State Life*, 274 F.2d at 775. Relying on *Coombes v. Getz*, 285 U.S. at 441-42, the Sixth Circuit held that the reserved power to amend the charter was not so broad as to allow the company to destroy the vested rights of its mutual

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[3] *See Lord v. Equitable*, 194 N.Y. 212, 87 N.E. 443, 448 (1909) ("When the Legislature has created a corporation and has given it power to acquire property, it cannot take away the property so acquired without providing for compensation . . . No reservation, for instance, could authorize a law giving to policyholders the capital stock belonging to the stockholders"). V. Morawetz, *Private Corporations* 1050 (1886), quoted in Taylor, *Evolution of Corporate Combination Law; Policy Issues And Constitutional Questions*, 76 N.C.L.R. 687, 1014 (1998) ("The property and privileges belonging to individual members of a corporation are subject to *the power of eminent domain* . . . and in the exercise of this power *a state* may enable any portion of the shareholders in a corporation to dissolve their association . . . *upon making just compensation to such shareholders as are not willing to accept the change* . . .").

policyholders: "In our opinion, the proposed amendment by the stockholders, acting under the power of corporate amendment conferred by the legislature, would be an impairment of the contract obligations of the corporation running to appellees." *Id.* at 779.[4]

Phillips Petroleum and *Coombes* have never been overruled by this Court, and thus remain controlling precedent.

B. The Decision Of The Fifth Circuit Erroneously Eliminates The Takings And Contracts Clauses' Restrictions On The Exercise Of State Reserved Power

The use of a statutory conversion by Hancock to effect the conversion of a state charter from a mutual to a stock company constitutes the exercise of reserved power and, therefore, "state action," because the exercise of this state power was used to take vested mutual life insurance contracts. "State action" constitutes conduct "fairly attributable" to the state. *Lugar v. Edmondson*, 457 U.S. 922, 937 (1982). A "state actor" exercises a right or privilege created by the state or engages in conduct imposed by the state or by a person for whom the state is responsible. *Id.* In a statutory conversion, such as here, the mutual insurer's use of reserved power embedded in statutory law is the exercise of a right or privilege created by the state.

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[4] State courts apply this rule in mutual to stock conversions. *Huber v. Martin*, 127 Wis. 412, 105 N.W. 1031, 1037-1039 (1906); *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371 (1884).

A mutual insurer's conduct is "fairly attributable" to the state where the mutual insurer, with state authorization, exercises a right under the state's reserved power, as in *Phillips Petroleum*, to "defeat or substantially impair the object of the grant, or any right vested under the grant. . . ." *Phillips Petroleum*, 297 U.S. at 635. Here, where a mutual insurer exercises reserved power to take vested contractual rights of policyholders to the surplus, then the mutual insurer is exercising state action. Exercise of reserved power can occur by amending the law under which a charter was taken, or by the creation of authority for the corporation to make the change itself. *Lord v. Equitable*, 194 N.Y. 212, 227, 87 N.E. 443, 448 (1909). Here, Massachusetts enacted its conversion law in 1992 to provide the procedures by which a mutual insurer could exercise reserved power of the State to change its corporate form and powers. Under the Conversion Law, a mutual insurer utilizes Massachusetts "reserved power" by creating and formulating a plan of conversion pursuant to the statutory procedure, including the value of compensation to be paid to policyholders for the loss of their interests in the mutual company, all subject to approval of the Commissioner of Insurance. Appendix D.

The court below, by focusing on the conduct of a state administrative officer under the Conversion Law, concluded that the state action no longer exists in the state's exercise of reserved power. The court recognized that Petitioner asserted that the conversion pursuant to the Conversion Law violated their rights under the Takings and Contracts Clauses. App. 20-21. To determine whether these constitutional provisions applied, the court below only examined this Court's decision in *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18,

30 (1888). From this case, the lower court concluded that the acts of state administrative or executive officials do not give rise to state action. Appendix B at App. 22.

The lower court's decision conflicts with established precedent of this Court. "State action" limits state legislative and administrative power from being used to deprive individuals of fundamental constitutional rights. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883). It provides: "modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." *Id. See also Swain v. State Of Alabama*, 380 U.S. 202, 204 (1964). "State action" applies with "reference to the laws of the State, or their administration by her officers." *United States v. Morrison*, 529 U.S. 598, 621 (2000). *New Orleans Waterworks*, itself, recognized that a law delegating legislative power gives rise to the exercise of state action. *New Orleans Waterworks*, 125 U.S. at 30-31. ("[I]t is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be [] the form of a statute enacted by the legislature . . . an exercise of legislative power delegated by the legislature" is also sufficient to fall within the scope of the provision). Here, Hancock abrogated Members' contractual rights through legislative "reserved" power exercised via the Conversion Law and as such became "state actors" subject to § 1983. The Conversion Law and the Commissioner's Decision are "laws." *Grand Trunk Western v. Railroad Comm'n*, 221 U.S. 400, 403 (1911) ("Observing first, that the order is a legislative act by an instrumentality of the state exercising delegated authority . . . is of the same force as if made by the legislature . . .").

Clearly, *New Orleans Waterworks* did not address the "reserved" power precedent underlying *Phillips Petroleum*.

A second element of state action examines whether a particular person or entity has conducted itself as a "state actor." *Lugar*, 457 U.S. at 937. This element requires a careful examination of the "specific conduct" alleged by the plaintiff. *Id.* The court below also erred by not focusing on the specific conduct about which Petitioner complained. In the statutory conversion here, the specific conduct alleged is that *the mutual insurer's use of reserved power under a statutory conversion procedure constitutes a taking of property without just compensation*. Given this conduct, a court must examine whether the three elements of a Takings violation exist including that: (1) a "property interest" exists; (2) a "taking" of that property occurred; and (3) there was a failure to pay "just compensation" upon the taking. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998). If these elements exist, *a fortiori*, "state-action" under either the Fourteenth Amendment or § 1983 must exist because conduct which satisfies the state-action requirement of the Fourteenth Amendment constitutes action "under color of state law" under § 1983. *Brentwood Acad. v. Tennessee Secondary School Athletic Assoc.*, 531 U.S. 288, 295, n.2 (2001).

The reserved power law stated in *Phillips Petroleum* remains intact. As this Court observed in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974), "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." The exercise of reserved power delegated by a conversion law likewise

implicates the power to take property and, therefore gives rise to state action.[5]

II. The Decision Of The Fifth Circuit Is In Direct Conflict With This Court's Decision In *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003)

The decision below directly conflicts with *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992), this Court explicitly recognized that government authorization that allows the taking of one's property by another constitutes conduct protected by the Takings Clause. A "physical" taking occurs where the government authorizes a physical occupation or taking of property by a third person or itself. *See Yee* at *Id.*, and *Loretto*, 458 U.S. at 426. Recently, this Court held that the use of government authority to transfer a contractual right constitutes a type of *per se* Taking:

> We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central's* ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the

[5] In recognition of these constitutional restrictions, appraisal statutes were enacted to provide a method of providing full compensation to contract holders injured by a corporate charter amendment. *See, e.g.*, Calio, *New Appraisals Of Old Problems: Reflections On The Delaware Appraisal Proceeding*, 32 Am. Bus. L.J. 1, 8-13 (1994) (tracing origins of appraisal rights). Mutual members have no comparable statutory rights.

> owner of the principal." 524 U.S. at 172, 118 S.Ct. 1925. If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.

Brown, 123 S.Ct. at 1419.

The lower court erred by not applying the mandated three-part Takings analysis required by *Phillips v. Washington Legal Foundation*, 524 U.S. 164 (1998). The three elements of a Takings claim (a property interest, a taking, and the failure to pay just compensation), exist with respect to a statutory conversion where, as here, it is alleged that the mutual policyholders' contractual rights were not fully compensated in the course of the conversion proceedings. In *per se* Takings cases a "clear rule" of just compensation applies. *See Yee*, 503 U.S. at 522-523. Here, as more fully discussed below, a property interest does exist. Second, a *per se* Taking occurs in a statutory conversion because the components of the mutual insurance contracts are abrogated by government power, not private consent. A *per se* Taking results when the powers to possess, use and control property are destroyed. *Loretto*, 458 U.S. at 434-35; *Yee*, 503 U.S. at 527; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Phillips*, 524 U.S. at 166 n.5.

A *per se* Taking similar to that identified in *Phillips* occurred here because, by the Commissioner's authority, Hancock took Petitioner's equity interests and assigned Petitioner's right to insurance benefits to a "closed block." App. 57-63. The value to be paid in exchange for these contractual rights was not determined privately, by arms length bargaining, but publicly, by the Commissioner as being "appropriate consideration." App. 89. The right of

ownership and control of the surplus was thus divested and was given to the public investors by the Commissioner's order. In sum, the conversion eliminated Petitioner's "possession, use and control" of property by determination of the Commissioner rather than by contract or private bargaining.

This abrogation of contractual rights involved state compulsion or "required acquiescence" which "is at the heart of the concept of occupation." *Yee*, 503 U.S. at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). The absence of consent is a key element of a "taking" as this Court explained, "The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lease and an interloper with a government license." *Florida Power*, 480 U.S. at 252-53. Here, Hancock was acting with a state license rather than with contractual consent. A "statutory conversion" is accomplished without the members' established contractual consent. Hancock did not use the contracted-for method of modification, but instead used the state's authority under the Conversion Law. Nor did the vote of members provide the consent for the loss of individual contractual rights. A vote of some or a majority cannot destroy rights given by contracts of the corporation. RUSS & SEGALLA, 3 COUCH ON INS. § 39:24 (3d ed. 1995-1996). In a mutual company, a vote of the membership cannot take away individual contractual interests because the members are both owners and customers of the company. *Parish v. New York Produce Exch.*, 169 N.Y. 34, 49, 61 N.E. 977, 981 (1901).

Finally, a Takings claim arises by the failure to provide full or equivalent compensation. "When the government physically takes possession of an interest in

property for some public purpose, it has a categorical duty to compensate the former owner." *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406, 1418 (2003). "'[J]ust compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Id.* at 1419. *See also United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961). A statutory conversion, as alleged here, deprives full and equivalent compensation. Clinton, *The Rights Of Policyholders In An Insurance Demutualization*, 41 Drake L. Rev. 657, 689 (1992) ("These provisions prevent policyholders from receiving the market value of their ownership interest").

III. The Lower Court's Decision Conflicts With *Williamson v. Hamilton County* And Decisions Of The Fourth And Sixth Circuits

In *Williamson County v. Hamilton Bank of Johnson City*, 473 U.S. 172, this Court recognized two conditions to the prudential ripeness of a § 1983 regulatory "Takings" claim: (1) the plaintiff must demonstrate that the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations; and (2) the plaintiff must have unsuccessfully availed itself of "reasonable, certain and adequate procedures" provided by the state for obtaining compensation. *Id.* at 187-194. *See also Suitum v. Tahoe Regional Planning*, 520 U.S. 725, 734 (1997).

As properly recognized by the Fourth Circuit in *Washlefske v. Winston*, 234 F.3d 179, 183 (4th Cir. 2000), *Williamson* provides a "rule of finality," not a requirement to "exhaust all potential state remedies." As the Fourth Circuit explained, *Williamson* requires a determination as

to whether a final decision by the state has been made authorizing a Taking *and* deciding the value of compensation, if any, to be paid:

> In this case, the finality of the State's position has not been questioned; the statute's language is clear and its impact upon Washlefske is uncontroverted . . . Not only is the State's use of the interest uncontroverted, but also its amount is readily calculable, more than satisfying the Supreme Court's prudential ripeness requirements.

Id. at 182-83. Once a state has determined to authorize a Taking *and* the designated state official has determined the amount of compensation, if any, that will be paid, a Takings Clause claim is ripe. In this sense, in a *per se* or "physical occupation" Takings case, ripeness exists as a matter of law when the property is transferred by government authority and the amount of compensation, if any, has been determined and provided. *Id. Williamson* was automatically satisfied here by the Commissioner's decision which authorizes the Taking and sets the amount of compensation to be made pursuant to the procedure in the Conversion Law.

To require a property owner to pursue additional potential state remedies would be to transform *Williamson* into an "exhaustion" requirement. *Washlefske*, 234 F.3d 179, 183; *Montgomery v. Carter County*, 226 F.3d 758, 765 (6th Cir. 2000) (In holding that the tract owner's claim was not ripe, the Supreme Court took pains to distinguish the concept of finality from the somewhat related but distinct concept of exhaustion of state remedies).

In contrast, the First, Fifth and Seventh Circuits construe *Williamson* to require an "exhaustion of all state

remedies." *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 146 (1st Cir. 2001); *Daniels v. Area Plan Comm.*, 306 F.3d 445, 453, n.6 (7th Cir. 2002) (stating "we need not resolve the tension between this circuit's and the Sixth Circuit's reading of *Williamson County*"). Under this rule, a Takings claimant is purportedly required to exhaust all potential state law remedies including action under state substantive law and the state constitution. *See, e.g., Deniz*, 306 at 147 ("if it is unclear whether a particular state law remedy pertains, the claimant must attempt to exploit it – and his federal takings claim will not be deemed ripe unless and until he has pursued, and exhausted that course").

The "exhaustion of all state remedies" rule is contrary to *Williamson* and the Takings Clause itself. The Takings Clause guarantees a *compensation* remedy for a Taking, any state law remedy would merely be supplementary. *First English Evangelical Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 314-15 (1987); *Jacobs v. United States*, 290 U.S. 13, 27 (1933). The Fourth Circuit in *Washlefske* succinctly recognized that supplementary state remedies cannot subvert the remedy specifically guaranteed by the Takings Clause in stating:

> If we were, in this circumstance, to require Washlefske to file his claim first in a Virginia court, we would be transforming *Williamson County's* finality rule into a rule of exhaustion. This result would be in diametric opposition to a foundational decision of modern § 1983 jurisprudence, *Monroe v. Pape,* which held that "the federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183 (1961).

234 F.3d at 183. This Court in *Williamson* explicitly ruled that "exhaustion of *review procedures*" was not required, citing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). *Id.* at 195 n.13. In *Patsy,* this Court refused to read a judicial or administrative exhaustion rule into § 1983 where the Congressional intent was clear that it was not intended. 457 U.S. at 509 ("Congress clearly expressed its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law"). Therefore, this Court in *Williamson*, referred consistently to a "procedure" provided by the state to obtain compensation, not all state remedies. 473 U.S. at 195. In this connection, if the State has provided a "procedure" to determine the amount of compensation, then the State has not reached a "final decision" on the amount of compensation to be paid. Thus, this Court in *Williamson* stated, "[I]f a State provides an adequate *procedure* for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the *procedure* and been denied just compensation." *Id.* at 195. A *procedure* does not mean all state remedies because the Takings Clause already provides the remedy.

Certiorari should be granted to resolve whether *Williamson* provides a rule of finality or one of exhaustion of state remedies.

IV. *Ortiz* Prohibits A Federal Court From Giving A Prior State Court Judgment In A Class Action *Res Judicata* Or Collateral Estoppel Effect To Bar The Subsequent Federal Takings Claims Of Absent Class Members Without Adherence To Due Process Requirements Of Notice, Opportunity To Be Heard, Adequate Representation And A Right To Opt-Out

Res judicata generally applies to bind absent class members except where to do so would violate the Due Process Clause. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). A class, therefore, cannot be bound to a judgment unless the requirements of class certification have been fully satisfied, including a determination of adequate representation. *Amchem Products v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard*, 527 U.S. 815 (1999). Nor can absent class members be bound without notice and a right to opt-out. *Phillips*, 472 U.S. 797, 812. Due process also demands a "full and fair opportunity" to litigate the issue. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 480-81 (1982).

The lower court found that Petitioner and the class he seeks to represent are bound by the judgment in the *Tierney* state court action even though that action was dismissed before any adjudication on the merits was made, and before any class certification proceedings were even conducted. None of the requisite due process protections were afforded in order to bind Petitioner including notice, an opportunity to be heard, a right to opt-out and a determination of adequate representation. *Tierney* did not involve a prior affirmative adjudication of Petitioner's claims to just compensation since it was dismissed before any decision on the merits. *See Costello v. United States*,

365 U.S. 265, 285-86 (1961), which explained that a dismissal for "lack of jurisdiction" under Fed.R.Civ.P. Rule 41(b) encompasses any dismissal preventing the Court's going forward to determine the merits of the substantive claim.

The lower court's decision conflicts with the Due Process principles recognized by this Court.

V. The Constitutional Questions Presented Affect The Valuable Property Rights Of Millions Of Mutual Policyholders Whose Contractual Rights Have Been Taken By A Statutory Conversion

The widespread use of statutory conversions affect significant and valuable property rights. A mutual life insurance contract evidences property because it is a formal understanding supporting a claim of entitlement. *Bishop v. Wood*, 426 U.S. 341 (1976); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose") and *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). The contracts here conferred proportionate ownership of a common fund and its earnings, which evidences property. *Phillips v. Washington Legal Foundation*, 524 U.S. at 166 n.5 (1998) ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property").

The Treasury Department specifically recognizes policyholders' contractual and ownership rights in its tax treatment of mutual insurers. Department Of The Treasury, *Report To The Congress On Property And Casualty Insurance Company Taxation* (Apr. 1991); Department Of

Treasury, *Final Report To The Congress On Life Insurance Company Taxation* at 23 (Aug. 1989) ("A 'participating' policy is one through which a policyholder buys not only some amount of term insurance and the equivalent of a savings certificate, but also an equity-like interest in the insurance company"). Federal courts have characterized the mutual life insurance contract to include, *inter alia*, the common equitable ownership of the assets by the members which may at their option be transferred into legal title and reduced to possession by dissolution of the company and the right to choose management. *Mutual Fire Ins. Co. of Germantown v. United States*, 142 F.2d 344, 348 (3d Cir. 1944); *Mutual Benefit Life Ins. Co. v. Herold*, 198 F. 199, 206-212 (D.N.J. 1912), *aff'd*, 201 F. 918 (3d Cir. 1913); *Keystone Auto. Club Cas. Co. v. Commissioner of I.R.S.*, 122 F.2d 886, 890 (3d Cir. 1941); *Rev. Ruling* 74-196, 26 C.F.R. § 1.501(c)(15)-1 ["Mutual Insurance Company; definition"].[6]

The constitutional questions presented are compelling given that a "statutory conversion" operates as a statutory method for the forced redemption of one's property to be given to another private party. As recognized by the First

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[6] *See also Lawrence v. Nelson*, 21 N.Y. 158, 160-161 (1860); *Commonwealth v. Massachusetts Mut. Fire Ins. Co.*, 112 Mass. 116 (1873); *McPherson v. Railway Sav. & Bldg. Ass'n*, 93 Colo. 155, 159-60, 25 P.2d 388, 389 (1933); *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371 (1884); MAY ON INSURANCE, ch. XXXI, § 548 "Of Mutual Insurance" (1900); *Spruance v. Farmers' & Merchants' Ins. Co.*, 9 Colo. 73, 77, 10 P. 285 (Colo. 1886) (citing *Union Ins. Co. v. Hoge*, 62 U.S. 35 (1858)); *Mygatt v. New York Prot. Ins. Co.*, 21 N.Y. 52 (1860); *Ohio Mutual Ins. Co. v. Marietta Woolen Factory*, 3 Ohio St. 348, 351 (1854); *Krugh v. Lycoming Fire Ins.*, 77 Pa. 15 (1874); R. KEETON, INSURANCE LAW at 33 (3d ed. 1988).

Circuit in *UNUM Corp. v. United States*, 130 F.3d 501, 511 (1st Cir. 1997), a conversion constitutes a redemption of ownership rights:

> Here, Union Mutual purchased its policyholders' equity interests and transferred them to UNUM. UNUM in turn exchanged the policyholders' membership interests in Union Mutual for stock in UNUM or cash. UNUM was financially in no worse a position after "paying out" $522 million worth of stock to implement the demutualization than it was before the transaction occurred. What changed was the form of ownership, precisely the topic which capital transactions typically involve.

The widespread effect of statutory conversions on mutual policyholders' property rights presents yet another substantial reason for granting certiorari.

CONCLUSION

Wherefore, it is respectfully requested that this Honorable Court grant certiorari in this case and in the related cases of *Tancredi v. Metropolitan Life Ins.*, No. 02-1542, and *Gayman v. Principal Financial Servs., Inc.*, No. 02-1551, in which Petitions for Writs of Certiorari were filed on April 21, 2003.

Respectfully submitted,

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Dated: May 14, 2003

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-40498

MICHAEL A. CAMPBELL, Individually and on behalf of other similarly situated former policyholders of John Hancock Mutual Life Insurance Co.

Plaintiff-Appellant,

versus

JOHN HANCOCK FINANCIAL SERVICES, INCORPORATED; ET AL.,

Defendants,

JOHN HANCOCK FINANCIAL SERVICES, INCORPORATED; JOHN HANCOCK LIFE INSURANCE COMPANY; JOHN HANCOCK MUTUAL, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas, Texarkana
(5:01-CV-48)

(Filed Feb. 13, 2003)

Before JONES, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:[1]

AFFIRMED. See Rule 47.6.

[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHAEL A. CAMPBELL, Individually and on behalf of OTHER SIMILARLY SITUATED FORMER POLICYHOLDERS OF JOHN HANCOCK MUTUAL LIFE INS. CO.	§	**5:01CV48**
V.	§	
JOHN HANCOCK FINANCIAL SERVICES, INC., JOHN HANCOCK LIFE INS. CO. and JOHN HANCOCK MUTUAL LIFE INS. CO.	§	

MEMORANDUM ORDER

(Filed Mar. 14, 2002)

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. The Report of the Magistrate Judge which contains her proposed findings of fact and recommendations for the disposition of such action has been presented for consideration. Plaintiff filed objections to the Report and Recommendation. The Court conducted a *de novo* review of the Magistrate Judge's findings and conclusions.

I. REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

In issuing her Report and Recommendation on Defendants' Motion to Dismiss, the Magistrate Judge applied *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), wherein the Supreme Court stated that a takings claim is not ripe until the claimant has unsuccessfully sought compensation from the state. Specifically, the Court reasoned as follows:

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

The Magistrate Judge stated that Michael A. Campbell [sic] ("Plaintiff"), suing on behalf of himself and similarly situated policyholders of John Hancock Mutual Life Insurance Company ("JHM"), had not convinced the Court that the conversion at issue in this case is outside Article X of the Massachusetts Declaration of Rights nor had Plaintiff established that the state would deny compensation were he to undertake the act of seeking it. Accordingly, the Magistrate Judge concluded, under the second prong of *Williamson*, that Plaintiff's takings claims were unripe until the potential state remedy had been pursued. Therefore, the Magistrate Judge recommended Plaintiff's § 1983 claims based on the underlying takings claims be dismissed as unripe.

The Magistrate Judge further recommended that Plaintiff's contract clause claims, which are based on the same facts as the takings claims, be dismissed. The

Magistrate Judge relied on *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), wherein the court noted that constitutional claims that rest upon the same facts as a takings claim are subject to the same ripeness requirements as the takings claim.

II. PLAINTIFF'S OBJECTIONS AS TO THE TAKINGS CLAIM

A. Effect of *Suitum v. Tahoe Regional Planning Agency*

Plaintiff first argues that dismissal of this action would be in error because federal question subject matter jurisdiction exists under 28 U.S.C. § 1331. Specifically, Plaintiff objects to the Magistrate Judge's reliance on *Samaad v. City of Dallas*, 940 F.2d 925, 934 n. 19 (5th Cir. 1991), wherein the Fifth Circuit held that the plaintiffs' "argument that there is some distinction between Article III ripeness and ripeness in takings cases is without merit." Plaintiff asserts the Supreme Court held in 1997 that there "are two independent *prudential* hurdles to a regulatory takings claim brought against a state agency in federal court." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 (1997) (Emphasis added). Based on *Suitum*, Plaintiff argues the *Williamson County* ripeness tests are not mandated by Article III of the United States Constitution, and they only become operative after subject matter jurisdiction has been established.

Suitum dealt with the first prong of *Williamson County*, which requires a final decision regarding the application of the challenged action to the property at issue. The Court did not decide whether *Williamson County's* "state procedures" requirement had been satisfied because

the plaintiff's counsel suggested at oral argument that the agency is not subject to inverse condemnation proceedings, and the agency's counsel did not disagree. Therefore, the Court left the matter to the Court of Appeals on remand. *Suitum*, 520 U.S. at 734, n. 8.

Accepting as true Plaintiff's argument that the requirements of *Williamson County* are not jurisdictional but "prudential hurdles", the Court finds the Article III requirements of standing have been met. However, the Court still concludes Plaintiff's takings claim must be dismissed under Federal Rules of Procedure 12(b)(6) because (1) Plaintiff has failed to pursue the remedies available to him through the state courts[1] or, in the alternative, (2) if Plaintiff is considered part of the *Tierney* state court action, Plaintiff is precluded from relitigating those claims on the principles of res judicata or collateral estoppel.

B. The Second Prong of *Williamson County*

Plaintiff argues the second prong of *Williamson* does not require exhaustion of all possible state remedies before the § 1983 takings claim is ripe. Specifically, Plaintiff argues *Williamson* "merely requires use of a procedure, not *all* possible procedures, established by a state legislature for obtaining 'just compensation,' which procedure will typically be the one established by the legislature in

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[1] *See Forseth v. Village of Sussex*, 199 F.3d 363, 372 n. 13 (7th Cir. 2000) ("Federal courts, relying on *Williamson*, have dismissed the vast majority of takings claims brought in federal court ... while the Supreme Court has repeatedly reaffirmed *Williamson*.")

connection with the particular type of taking in issue and which can be either administrative or judicial."[2]

Plaintiff asserts it was unnecessary for him to pursue a claim under Massachusetts Article X because he utilized the procedure contained in the Conversion Law for seeking compensation. "Indeed, this occurred automatically under the law, as the Commissioner reviewed and approved a plan providing compensation for all policyholders."[3] Plaintiff further argues that if he did not fulfill *Williamson County's* second prong by seeking compensation pursuant to the administrative procedure contained in the Conversion Law and resort to the Massachusetts courts was necessary, Plaintiff may properly rely on the putative *Tierney* class of JHM policyholders to protect his interest.

Defendants assert, however, that Plaintiff's argument is "completely at odds with the facts (plaintiff never even submitted objections at the administrative hearing, much less challenged the Commissioner's decision) and the arguments made to the Magistrate Judge (*i.e.* that plaintiff is not a member of the purported *Tierney* class, that the Conversion Law and Rule 30A do not provide a suitable mechanism for pursuing his remedies, and that the state court did not address the just compensation issue)."[4] Specifically, Defendants assert that Plaintiff did not appear at the administrative hearing conducted by the Commissioner and did not raise any objection to the Plan. Also according to Defendants, two other policyholders, who

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[2] Plaintiffs' objections at 2.

[3] Plaintiff's reply at 4.

[4] Defendant's opposition at 3-4.

did lodge objections at the hearing, subsequently filed a putative class action complaint against the Commissioner and JHM in the Superior Court of Massachusetts. That complaint was brought pursuant to Rule 30A, which provides that certain persons may seek judicial review of an administrative decision in Superior Court. On December 18, 2000, the Massachusetts Superior Court ruled against the state court plaintiffs on all nine counts, granting the Commissioner's motion for judgment on the pleadings and JHM's motion to dismiss. The policyholders have appealed that decision to the appellate court.

Defendants essentially argue that Plaintiff did not seek judicial review of the Commissioner's decision at the Massachusetts Superior court, and after that court rejected virtually identical claims made by fellow policyholders, Plaintiff filed this cause of action in an attempt to "run around the Superior Court's decision."[5] Defendants argue this suit is inherently an attack on the Commissioner's decision and should have been brought in state court pursuant to Rule 30A. Therefore, Defendants contend the Magistrate Judge correctly applied the law based on the arguments made in Plaintiff's Brief, which were as follows: (1) *Williamson County* does not apply to this case because Plaintiff is alleging a physical occupation taking as opposed to a regulatory taking; (2) it was unnecessary for Plaintiff to exhaust his remedies under either the Conversion Law or Rule 30A because those procedures do not allow for the recovery of damages; and (3) it was unnecessary for plaintiff to bring an Article X proceeding

[5] *Id.* at 6.

because it only provided rights to inhabitants of Massachusetts.

The Court agrees that these were the arguments presented to the Magistrate Judge for her consideration. However, Plaintiff presents these additional arguments in his objections to the Report and Recommendation: (1) the *Williamson County's* ripeness test is not a jurisdictional question, (2) because Plaintiff was a member of the putative class in *Tierney*, the Superior Court's affirmance of the Commissioner's decision suffices to fulfill the second prong of *Williamson County*; and (3) *Williamson County* is inapplicable to Plaintiff's contract impairment and substantive due process claims.

As an initial matter, the court finds it improper for a party to object to the Magistrate Judge's recommendation on the basis of new arguments to the Court. In *Cupit v. Whitley*, 28 F.3d 532, 535, n. 5 (5th Cir. 1994), *cert. denied*, 513 U.S. 1163 (1995), the Fifth Circuit quoted a First Circuit case, which explained that a party "has a duty to put its best foot forward" before the Magistrate Judge – i.e., "to spell out its arguments squarely and distinctly" – and, accordingly, that a party's entitlement to *de novo* review before the district court upon filing objections to the Report and Recommendation does not entitle the party to raise issues at the stage that were not adequately presented to the Magistrate Judge. *Paterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988).

Considering only the arguments presented to the Magistrate Judge, Plaintiff did not avail himself of an available state remedy. The evidence shows Plaintiff did not object at the hearing before the Commissioner, and

Plaintiff stated in his response to Defendant's motion to dismiss that Policyholders were not parties to the administrative decision. The Court concludes Plaintiff had an obligation to first pursue his claims in state court.

In the alternative, Plaintiff asserts that "the Magistrate Court incorrectly concluded that Plaintiff had the obligation to bring a suit pursuant to Art. X of the Massachusetts Constitution."[6] Seizing on the requirement that the available state remedy be "adequate", Plaintiff contends it is absolutely certain that he cannot obtain relief pursuant to Article X of the Massachusetts Constitution. Specifically, Plaintiff suggests the decision in *Teirney* shows that Massachusetts does not offer him a remedy. The appropriate point for determining the adequacy of the state compensation procedures is at the time the alleged taking occurs. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1479 (9th Cir. 1989). The Court agrees that Plaintiff has not met his burden, as set forth in *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991), of establishing that Plaintiff would "almost certainly" not be compensated under Massachusetts law at the time the alleged taking occurred.

C. Preclusion under *Williamson County*

In an attempt to offer additional arguments, Plaintiff relies on *Freeman v. County of Bexar, et al.*, 142 F.3d 848, wherein the Fifth Circuit held the district court has the discretion to consider additional evidence on its *de novo*

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[6] Plaintiffs' objections at 2.

review of objections to the magistrate judge's recommendation. While the Court distinguishes between additional evidence and contradictory arguments, the Court will consider Plaintiff's contentions that he was a member of the purported class in *Tierney* and that the state court complaint sufficiently presented Plaintiff's just compensation claim so as to satisfy *Williamson County*.

In such a case, Defendants first argue Plaintiff's claims would not be ripe until the appellate process is complete. Specifically, Defendants argue *Tierney* is currently on appeal, making Plaintiff's takings claim unripe. The Court is only able to find two unpublished circuit opinions which hold that *Williamson County's* second prong requires completion of the entire process available for compensation through the final appeal. Therefore, the Court will consider Defendants' second argument, which is that a final decision in *Tierney* would preclude Plaintiff from relitigating those claims on the principles of res judicata (claim preclusion) or collateral estoppel (issue preclusion).

The Full Faith and Credit statute provides, in relevant part, that judicial proceedings of any state court "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. This statute requires federal courts to "give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Thus, if a state court would hold an action as precluded by previous litigation, the federal court must do the same. Many commentators have noted that the combination of

Williamson County and § 1738 essentially mandates the dismissal of nearly all takings claims filed in federal court. *See Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 10 (1999).[7]

To avoid the preclusion problem, the Eleventh Circuit allows plaintiffs to "reserve" their right to litigate federal claims in federal court while proceeding on state claims in state court as required by *Williamson County*. *See e.g.*, *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992). Defendants correctly note, however, that no such reservation has been presented in this case since Plaintiff has not taken any action prior to filing this lawsuit. Accordingly, assuming Plaintiff participated in *Tierney* as a member of the putative class, the Court must look to Massachusetts law to determine the preclusive effect of the decision in *Tierney*. *Migra*, 465 U.S. at 81.

Under Massachusetts law, claim preclusion "generally applies only to actions between parties to the prior litigation, or between a party to the prior litigation and a person whose interest [sic] were represented by a party to the prior litigation." *Hermes Automation Technology, Inc. v. Hyundai Elec. Indus.*, 915 F.2d 739, 750 (1st Cir. 1990).

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[7] When presented with *Williamson County's* requirement that a plaintiff must take its takings claim to state court before the case will be ripe for federal adjudication, courts have held that "this requirement does not prevent the doctrine of res judicata from barring subsequent federal action." *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 363-64 (9th Cir. 1993).

The *Restatement (Second) of Judgments* describes res judicata as follows:

> A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.
>
> * * *
>
> [T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Issue preclusion will also bar relitigation of an issue by one who, although not a party to the original suit, is in privity with a party to that suit. However, due process concerns are present when the party sought to be precluded was not an actual party in the first lawsuit. *See Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). Courts have held that "virtual representation" describes various relationships between litigants that would not have come within the traditional definition of the term "privity." *See Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996). Due to the equitable and fact-intensive nature of virtual representation, courts should consider factors such as whether identity of interests between the two parties exists and whether the present party deliberately maneuvered to avoid the effects of the first action. *Id.*

Plaintiff, as part of the putative class in *Tierney* or as a person whose interests were represented by the two named plaintiffs in *Tierney*, brings federal claims that grow out of the same "transaction, or series of connected transactions" as those brought in *Tierney* – namely that because JHM's Conversion plan inadequately compensated

Plaintiffs for giving up their ownership rights in the company, the Commissioner's approval of the Plan exceeded her authority and constituted an unconstitutional taking of Plaintiffs' property.

Plaintiff's allegations are the same as those alleged by the plaintiffs in *Tierney* and subsequently dismissed by the Superior Court. Specifically, Plaintiff alleges the Conversion Law authorized "anti-takeover" provisions which, by their nature, depress the value of an otherwise freely traded stock company.[8] Plaintiff further alleges the "historic plus" method used to allocate consideration to policyholders deprives the policyholders of the right to compensation based upon the amount of their respective contributions to surplus.[9] Plaintiff also alleges that the Closed Block deprives policyholders of the security and income provided by their ownership of their own mutual company.

The Superior Court discussed at length each of Plaintiff's aforementioned allegations and concluded that the "Commissioner's Decision was supported by substantial evidence, was warranted by the facts presented to and found by her, and was neither based on an error of law nor was it arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[10]

The Court, having reviewed the state court decision and Plaintiff's Class Action Complaint, concludes the same

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[8] Class Action Complaint at 11, ¶ 37.

[9] *Id.* at 13, ¶ 43.

[10] *Thomas Tierney, et al. v. John Hancock Mutual Life Ins. Co., et al.*, No. 00-0087 at 15.

claims and issues were involved in the prior state court proceeding. In *Tierney*, the policyholders asserted that the Plan constituted an unconstitutional taking of property in violation of the state and federal constitutions. They specifically asserted the right to "just compensation" damages as a result of this alleged, unconstitutional taking. The identity of claims and issues in this case is reinforced by comparison of Plaintiff's brief with that of the plaintiffs in *Tierney*. Many portions of Plaintiff's brief are identical to portions of the *Tierney* brief. Therefore, the Court alternatively concludes that Plaintiff, as either a party to the state court action or as one whose interest was adequately represented by the state court plaintiffs, is bound by the Superior Court's decision.

1. Effect of the Appeal

Plaintiff argues, however, that *Tierney* is currently on appeal, not final, and could not have any preclusive effect. Defendants rely on *Tyus v. Schoemehl*, 93 F.3d 449, 452 & 458 (8th Cir. 1996), arguing the fact that the Superior Court's decision is being appealed is irrelevant for preclusion purposes. The Court concludes the Superior's Court's decision is final for preclusion purposes pending appeal.

2. Effect on the Purported Class Action

Plaintiff further argues Defendants cannot obtain preclusive effect from the *Tierney* decision to use against potential class members, as they attempt to do here, because the issue of class certification was never decided in *Tierney*. Basically, Plaintiff seeks to use his membership in the putative class in *Tierney* as a means to satisfy the second prong of *Williamson County* but also as a

means to avoid the preclusive doctrines of res judicata and collateral estoppel. Plaintiff cannot have it both ways.

The Court distinguishes *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877 (6th Cir. 1997), wherein the court held that because the class in a previous proceeding was not certified, and because the court granted the defendant's motion for summary judgment before ruling on class certification, the plaintiff and other putative class members "had no opportunity to litigate their claims in that action." *Id.* at 882. The court would not hold that the plaintiff's failure to bring his own suit implied that the plaintiff agreed to be bound by the earlier litigation.

The Court has been unable to find any case law discussing the ripeness requirement of *Williamson County* and its effect on members of a putative class. Not only does the Court disapprove of Plaintiff's new argument that he participated in *Tierney* as part of the putative class, but the Court also questions whether such alleged involvement even satisfies the second prong of *Williamson County*. Assuming it does, however, the Court finds Plaintiff was "virtually represented" by the plaintiffs in *Tierney*, and therefore issue preclusion does apply. *See Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996).

III. PLAINTIFFS' OBJECTIONS AS TO THE CONTRACT IMPAIRMENT AND SUBSTANTIVE DUE PROCESS CLAIMS

Finally, Plaintiff argues the second prong of *Williamson County* is not applicable to § 1983 claims arising under the Impairment of Contract Clause or Substantive Due Process Provisions of the Fifth Amendment. Specifically, Plaintiff argues the Fifth Circuit held in *John Corp. v. City*

of Houston, 214 F.3d 573, 585 (5th Cir. 2000), that other non-Fifth Amendment takings claims could proceed in federal court even where the Fifth Amendment takings claim was not "ripe" for decision.

Defendants argue, however, that the considerations underlying *Williamson County* equally apply to Plaintiff's contract impairment claims. Moreover, Defendant argues the Court should ignore Plaintiff's newly-asserted "substantive due process claim" since it does not appear in the Complaint or in Plaintiff's earlier brief.

A. Substantive Due Process Claims

While the Fifth Circuit did not adopt the Tenth Circuit's rule of considering substantive due process claims alleging deprivations of property as necessarily subsumed under the Takings Clause, the court has held that "when a state interferes with property interests, a substantive due process claim *may* survive a takings analysis and, therefore, provide jurisdiction for a federal court." *Simi Investment Company, Inc. v. Harris County, Tx.*, 236 F.3d 240, 249 (5th Cir. 2000); *see also The John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000).

John Corp. concerned an allegation that the city deprived landowners of property by allowing demolition under unconstitutionally vague ordinance, which states a cognizable substantive due process claim. Similarly, the plaintiff in *Simi* alleged the county arbitrarily and unlawfully attempted to interfere with private property rights.

Plaintiff contends the following allegations constitute substantive due process claims: (1) whether the "historic plus" method of valuation was constitutional or instead

deprived policyholders of their right to just compensation; (2) whether Defendant's method to allow stock trades on the market to determine "fair market" value at the time of taking is constitutional; and (3) whether the substitution of a *non*-participating "Closed Block" deprived policyholders of their property rights without more just compensation. (Emphasis in Plaintiff's objections). Having carefully reviewed Plaintiff's Complaint, the Court concludes that Plaintiff's claims, including requests for a *fair process* for the distribution of the full value of the JHM to policyholders,[11] and to obtain fair market value using the auction (fair market) *process* or other *procedures* to provide the fair market value to policyholders,[12] invoke a takings claim, and do not state a cognizable substantive due process violation.

B. Impairment of Contract Claim

As discussed above, the Fifth Circuit in *John Corp.* discussed *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), disapproving of its absolute rule that takings claims always subsume due process claims. The Fifth Circuit did not address the Contract Clause, and the Court has not found any cases dealing with takings claims and Contract Clause claims together in this context. Therefore, the Court will consider Defendant's Rule 12(b)(6) motion to dismiss Plaintiff's Contract Clause claims.

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[11] Class Action Complaint, ¶ 39.

[12] *Id.* at ¶ 38.

FED.R.CIV.P. 12(b)(6) authorizes a dismissal of a complaint for "failure to state a claim upon which relief can be granted." A 12(b)(6) motion should be granted only if it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Before dismissal is granted, the court must accept all well-pleaded facts as true and view them in the light most favorable to the nonmovant. *Capital Parks, Inc. v. Southeastern Advertising and Sales Sys., Inc.*, 30 F.3d 627, 629 (5th Cir.1994). A court need not, however, accept as true allegations that are conclusory in nature. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir.1982).

The Contract Clause provides that no State shall pass any law impairing the obligation of contracts. U.S. CONST., Art. I, § 10. The elements of a claim under the Contract Clause are well established: (1) a contractual relationship; (2) a change in law impairing that relationship; and (3) impairment that is substantial and unjustified. *General Motors Corp. v. Romein*, 503 U.S. 181, 185-86 (1992). Defendant relies on *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30 (1888), wherein the Supreme Court stated:

> In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or

officers, or the doings of corporations or individuals.

More recent Supreme Court cases have not dispensed with the necessity of establishing that the contract at issue was impaired by an act of legislative power. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Plaintiff first alleges an unconstitutional impairment of contract based on the "mutual surplus." Specifically, Plaintiff alleges policyholders paid for a participating policy in a Massachusetts mutual insurer, JHM. Plaintiff alleges JHM's use of a "Historic Plus" method for distributing its net surplus was (1) inconsistent with the Charter, and (2) inconsistent with JHM's and its policyholders' interpretation of the Charter.[13] Moreover, Plaintiff alleges the implementation of the Plan impaired the rights of all policyholders because only a minority of the policyholders were advised of their right to vote, and only a minority of the policyholders actually did vote. Plaintiff alleges that Hancock's and JHM's impairment of the policyholders' right to vote with respect to the Plan caused the policyholders damages.[14]

Finally, Plaintiff asserts that in 1991, the Massachusetts Legislature enacted the Conversion Law which created the procedure to convert mutual life insurance companies to stock life insurance companies. Plaintiff further asserts that from 1862 until 1991, Massachusetts

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[13] Class Action Complaint at 21-22, ¶ III.

[14] *Id.* at 22-23, ¶ IV.

did not have an insurance conversion law that would have alerted mutual policyholders that their mutual life insurance policies could be taken from them. Plaintiff alleges Hancock and JHM "have been assisted by the Commonwealth of Massachusetts in repudiating the contracts of mutual life insurance with other private parties – the Policyholders. Massachusetts, however, cannot constitutionally pass an ex-post facto law that, directly or indirectly, destroys the pre-existing property rights of millions of Policyholders to benefit Hancock and its private investors, without providing just compensation therefor." Finally, Plaintiff alleges an unconstitutional impairment of contract because Defendants "applied the Conversion Law in violation of the U.S. Constitution by the creation and/or authorization of the Plan. . . . "[15]

The Court agrees with Defendants that Plaintiff has alleged that the *application* of the Conversion Law to JHM was unconstitutional because of particular provisions in its Charter. This allegation alone would be insufficient to state a claim under the Contract Clause. Accepting all well-pleaded facts as true and viewing them in the light most favorable to Plaintiff, however, the Court notes that Plaintiff has further alleged an attempt on the part of the state and officials to "use the law . . . to repudiate a contractual obligation." *See, e.g. Smith v. Sorensen*, 748 F.2d 427, 437 (8th Cir. 1984), *quoting Jackson Sawmill Co. v. United States*, 580 F.2d 302, 312 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

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[15] *Id.* at 23-24, ¶ V.

Plaintiff has not sued the Commonwealth of Massachusetts. Plaintiff has only sued John Hancock Financial Services, Inc., John Hancock Life Insurance Company, and John Hancock Mutual Life Insurance Company for applying the Conversion Law in violation to the Contract Clause. In *Connor v. Matthews*, 134 F.Supp.2d 797, 799 n.1 (N.D. Tex. 2001), a case against a collection agent for the Internal Revenue Service, the court stated that "the Constitution's impairment of contract clause applies only to states. . . . " The Court agrees and concludes that actions of administrative or executive officials, private corporations, and individuals, even when applying state law, do not violate the Contract Clause. Accordingly, the Court is of the opinion that Plaintiff's Contract Clause claim must be dismissed pursuant to FED.R.CIV.P. 12(b)(6).

IV. CONCLUSION

The findings and conclusions of the Magistrate Judge are correct to the extent that the Magistrate Judge found Plaintiff's takings claim is not ripe. The Court has also concluded that Plaintiff's newly-asserted substantive due process allegations invoke a takings claim, not a substantive due process violation. Moreover, the Court has concluded that Plaintiff's impairment of contract claim should be dismissed for failure to state a claim upon which relief can be granted. Based on the foregoing, it is hereby

ORDERED that Plaintiff's cause of action is dismissed.

SIGNED this 14th day of March, 2002.

/s/ David Folsom
DAVID FOLSOM
UNITED STATES DISTRICT
JUDGE

E.O.D. 3/14/02

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHAEL A. CAMPBELL, Individually and on behalf of OTHER SIMILARLY SITUATED FORMER POLICYHOLDERS OF JOHN HANCOCK MUTUAL LIFE INS. CO.	§	
V.	§	**5:01CV48**
JOHN HANCOCK FINANCIAL SERVICES, INC., JOHN HANCOCK LIFE INS. CO. and JOHN HANCOCK MUTUAL LIFE INS. CO.	§	

FINAL JUDGMENT

This action came on before the Court, Honorable David Folsom, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is hereby

ORDERED that the above-entitled and numbered cause of action is dismissed without prejudice.

All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 14th day of March, 2002.

/s/ David Folsom
DAVID FOLSOM
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHAEL A. CAMPBELL, Individually and on behalf of OTHER SIMILARLY SITUATED FORMER POLICY-HOLDERS OF JOHN HANCOCK MUTUAL LIFE INS. CO.	§	**No. 5:01CV48**
Plaintiffs	§	
V.	§	
JOHN HANCOCK FINANCIAL SERVICES, INC., JOHN HANCOCK LIFE INS. CO., and JOHN HANCOCK MUTUAL LIFE INS. CO.	§	
Defendants	§	

REPORT AND RECOMMENDATION
OF THE UNITED MAGISTRATE JUDGE

(Filed Sep. 21, 2001)

Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for Assignment of Duties to United States Magistrate Judges dated January 15, 1994, The John Hancock Defendants' Motions (1) to Dismiss under Rules 12(b)(1), 12(b)(3), and 12(b)(6), or in the Alternative (2) to Transfer, or in the Alternative (3) to Abstain (Docket Entry # 8) was referred to the Honorable Caroline M. Craven for the purpose of making a report and

recommendation. The Court, after reviewing the motion, the response, and the reply, recommends that Defendants' 12(b)(1) motion be **GRANTED**.

I. BACKGROUND

This cause of action arises out of the January 2000 reorganization of John Hancock Mutual Life Insurance Company ("JHM") from a mutual life insurance company to a stock life insurance company pursuant to § 19E of Chapter 175 of Massachusetts General Laws ("the Conversion Law"). Section 19E provides authority for conversion where the Massachusetts Commissioner of Insurance ("the Commissioner") finds that the Plan of Reorganization ("the Plan"): (1) conforms to the Conversion Law and is not prejudicial to the policyholders or the insuring public; (2) is approved by a vote of not less than two-thirds of the insurer's policyholders who vote, and; (3) gives eligible policyholders "appropriate consideration" in exchange for the extinguishment of all of their membership interests as determined under a fair and reasonable formula based upon additional provisions in § 19E(3).

A public hearing was held in the fall of 1999. As required by § 19E, JHM's policyholders voted to approve the plan by nearly 94% of the votes cast by 1.1 million voting policyholders, surpassing the statutory requirement of a two-thirds vote. The Commissioner approved JHM's Plan after providing widespread notice, conducting an adjudicatory hearing, and making findings based on an extensive record.

Two other policyholders, who were present at the hearing and objected to the Plan, filed a putative class

action complaint against the Commissioner and John Hancock in the Superior Court of Massachusetts. *See Thomas Tierney and Doris G. Marah v. John Hancock Mutual Life Ins. Co., et al.*, Civ. No. 2000-0087 (the "state court action"). The plaintiffs in the state court action alleged that the conversion constituted "an unconstitutional taking" of policyholders' property rights and an impairment of contractual rights that they allegedly derived from John Hancock's charter and participating life insurance contracts. On December 18, 2000, the Massachusetts Superior Court ruled against the plaintiffs on all counts, granting the defendants' motion for judgment on the pleadings and John Hancock's motion to dismiss.

In this case, Michael A. Campbell ("Plaintiff") sues on behalf of himself and other similarly situated policyholders of JHM. Plaintiff asserts the Commissioner did not apply constitutional just compensation standards, nor did she determine whether the Plan provided policyholders just compensation. Specifically, Plaintiff alleges JHM's failure to pay, due in part to the state's failure to require JHM to pay, just compensation deprived policyholders of rights secured by the "Takings Clause" of the Fifth and Fourteenth Amendments and the "Impairment of Contracts Clause" of the United States Constitution.[1] Plaintiff alleges five causes of action based on 42 U.S.C. § 1983, which are as follows: (1) unconstitutional taking resulting from valuing policyholders'

[1] The Impairment of Contracts Clause provides that the states shall not pass any law impairing the obligations of contracts. U.S. CONST. art. I, § 10, cl. 1.

ownership interests on a less than fair market value basis; (2) unconstitutional taking resulting from valuing policyholders' ownership interests on the historic plus allocation method; (3) unconstitutional impairment of contract – the mutual surplus; (4) unconstitutional impairment of contract – the policyholders' right to vote; and (5) unconstitutional impairment of contract – to benefit special private interests.

Before the Court is Defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6). First, Defendants move to dismiss this action for improper venue pursuant to 28 U.S.C. § 1406(a), arguing venue is improper as to the Commissioner, who is an indispensable party to this action. Alternatively, Defendants argue the Court should transfer this lawsuit to the District of Massachusetts or, at the very least, to the Sherman Division in the interests of justice. Defendants also move to dismiss for lack of subject matter jurisdiction or as barred by res judicata. Finally, Defendants have filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The Court will first consider whether it has subject matter jurisdiction over this cause of action.

II. DEFENDANTS' 12(b)(1) MOTION TO DISMISS

A. 12(b)(1) Standard

Motions filed under FED.R.CIV.P. 12(b)(1) challenge the subject matter jurisdiction of the district court. Subject matter jurisdiction must be determined before the court addresses other grounds for dismissal. *See Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 220 (5th

Cir.), *cert. granted*, 525 U.S. 1039 (1998). The court's dismissal of a case for lack of subject matter jurisdiction is not based on the merits and does not prevent the plaintiff from bringing suit in a court with proper jurisdiction. *See Hitt v. Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). The burden of proof is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F.Supp. 305, 307 (E.D. Tex. 1995), *aff'd*, 102 F.3d 551 (5th Cir. 1996).

B. Resort to State Procedures

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST., Amend. V. The Supreme Court has held the clause applies to the states through the Fourteenth Amendment. *See Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

Defendants argue that Plaintiff's takings claims and contract clause claims should be dismissed for lack of subject matter jurisdiction because Plaintiff failed to utilize available state procedures for challenging the conversion or for obtaining just compensation. Ripeness is a "constitutional prerequisite to exercise of jurisdiction by federal courts." *Marchi v. Board of Cooperative Educational Services of Albany*, 473 F.3d 469, 478 (2d Cir.), *cert. denied*, 528 U.S. 869 (1999). "A takings claim is not ripe until the claimant has successfully sought compensation from the state." *Samad v. City of Dallas, et al.*, 940 F.2d 925, 933 (5th Cir. 1991) (*citing Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

In *Williamson County*, a case involving a landowner's challenge to the application of zoning laws, the Supreme Court held that a takings claim is not ripe (1) until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the claimant has sought compensation from the state if the state provides a "reasonable, certain, and adequate provision for obtaining compensation." *Id.* at 186.

The Supreme Court in *Williamson* held that respondent's claim was not yet ripe because respondent did not seek compensation through the procedures the state provided for doing so. *Id.* at 194. Specifically, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."[2] *Id.* at 195. The Court noted that Tennessee law provides that a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking of property under certain circumstances. The Court stated that respondent had not shown that the inverse condemnation procedure was unavailable or inadequate. Therefore, the Court held that until it utilized that

[2] The Fifth Amendment proscribes taking *without just compensation*. No constitutional violation occurs until just compensation has been denied. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Williamson*, 473 U.S. at 195, n. 13.

procedure, respondent's taking claim is premature. *Id.* at 196-97.

First, Plaintiff argues that *Williamson* does not apply in this case because this is not a "regulatory takings" case, but rather a "physical occupation taking."[3] The Court disagrees. In *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375 (2d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996), Villager Pond similarly argued that "a plaintiff who alleges a physical taking, as opposed to a regulatory taking, is not required to seek compensation in a state proceeding before the claim will be considered ripe." *Id.* at 380. The court stated that *Williamson* made no distinction between physical and regulatory takings. Accordingly, the court held that, regardless of whether Villager Pond's claim alleges a physical or regulatory taking, the claim was not ripe for review. *Id. See also Sinaloa Lake Owners Assn' v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) ("Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available."), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996) ("To the extent that *Sinaloa* stands for the proposition that a plaintiff may bring a substantive due process claim whenever his other claims are unsuccessful, we overrule it now.").

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[3] Plaintiff's response at 50.

C. Adequacy of the State's Procedures

Plaintiff next argues the case is clearly ripe under *Williamson* because Plaintiff and the purported class have pled that the state has denied just compensation and the state has not provided any adequate or certain procedure for obtaining just compensation. Specifically, Plaintiff asserts that neither the Conversion Law nor the Judicial Review Act allow for the recovery of damages. In addition, Plaintiff asserts that Article X of the Massachusetts Declaration of Rights provides rights to inhabitants of Massachusetts, not to nonresidents like Plaintiff Campbell, who reside in Texas.[4]

Plaintiff also relies on *Tierney v. John Hancock*, 00-0087 BLS (Sup. Ct. Mass.), *appeal pending* 2001-P-0435 (Ct. Appls.) DA 217-235, in support of his argument that the state has failed to provide a mandated just compensation procedure. The plaintiffs in *Tierney* applied for judicial review of the Commissioner's findings. The court stated that such an action is basically an appeal governed by G.L.c. 30A § 14. Plaintiff asserts that the *Tierney* court dismissed state law contract and fiduciary duty claims brought by policyholders as purportedly superseded by the Commissioner's decision approving the Plan pursuant to the Conversion Law. Plaintiff argues the Conversion Law does not provide, and the Commissioner did not require, provisions designed to adjudicate just compensation. Therefore, Plaintiff asserts that this action is the only available procedure for obtaining just compensation.

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[4] Plaintiffs' response at 52.

The Court must first decide if the state has provided a procedure for obtaining just compensation. Article X of the Massachusetts Declaration of Rights provides, in pertinent part, that "no part of the property of *any individual*, can, with justice be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. . . . And, whenever the public exigencies require that the property of *any individual* should be appropriated to public uses, he shall receive a reasonable compensation thereof. MASS.CONST., Art. X. (Emphasis Added). Not only has Plaintiff failed to provide any authority for his argument that Article X only applies to residents, but the Court also notes that nonresidents have alleged violations under Article X and Massachusetts courts have addressed, without comment, the allegations. *See, e.g., Frost v. Commissioner of Corps. & Taxation*, 293 N.E.2d 862 (Mass. 1973).

In *Culebras Enterprises Corp. et al. v. Rivera Rita*, 813 F.2d 506 (1st Cir. 1987), when it was unclear whether the applicable statute would provide the plaintiffs with certain and adequate relief under *Williamson*, the First Circuit stated that:

> Plaintiffs have certainly not proven the inadequacy of the Commonwealth's inverse condemnation remedy. We think they must pursue that remedy before they can maintain a federal damages claim, since, when fleshed out by the local court, that remedy could well provide the "certain and adequate" relief they seek.

Id. at 515.

In *Samaad*, the Fifth Circuit stated that "[c]laimants who have failed to seek compensation through available state procedures frequently argue that those procedures are 'inadequate' and that resort thereto would have proven futile." *Samaad*, 904 F.2d at 933. The court also noted that numerous courts have held that "inadequate" procedures are those that "*almost certainly* will not justly compensate the claimant." *Id.* at 934. The court stated that before a takings claim is ripe, the claimant must first unsuccessfully seek compensation. "Short of that, it must be certain that the state *would* deny that claimant compensation were he to undertake the obviously futile act of seeking it." *Id.*

Plaintiff has not convinced the Court that the conversion at issue in this case is outside Article X of the Massachusetts Declaration of Rights nor has Plaintiff established that the state would deny him compensation were he to undertake the act of seeking it. Accordingly, under the second prong of *Williamson*, Plaintiff's takings claims are unripe until the potential state remedy has been pursued. The Court recommends that Plaintiff's § 1983 claims based on the underlying takings claims be dismissed for lack of jurisdiction.

D. Impairment of Contract Claims

Courts have held that constitutional claims that rest upon the same facts as a takings claim are subject to the same ripeness requirements as the takings claim. *See Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996). The court concludes that Plaintiff's contract clause claims are subsumed with the takings claims, and are also premature. Based on the Court's determination that

Plaintiff's takings claims are unripe, the Court also recommends that Plaintiff's contract clause claims, which are based on the same facts as the takings claims, be dismissed.[5] Based on the foregoing, it is

RECOMMENDED that the John Hancock Defendants Motion to Dismiss under Rule 12(b)(1) be **GRANTED**.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 21st day of September, 2001.

/s/ Caroline M. Craven
CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE

[5] Due to the Court's recommendation as to Defendants' 12(b)(1) motion, the court need not address Defendants' other motions.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHAEL A. CAMPBELL, individually and on behalf of other similarly situated former policyholders of John Hancock Mutual Life Insurance Company,	§	
PLAINTIFF,	§	**CIVIL ACTION NO. 05-01-CV-48**
v.	§	**CLASS ACTION**
JOHN HANCOCK FINANCIAL SERVICES INC., JOHN HANCOCK LIFE INSURANCE COMPANY, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,	§	
DEFENDANTS.	§	

ORDER OF DISMISSAL

(Filed May 29, 2001)

On Notice of Plaintiff, Michael A. Campbell, individually and on behalf of other similarly situated former policyholders of John Hancock Mutual Life Insurance Company ("Campbell"), it is

ORDERED, ADJUDGED AND DECREED that the claims and causes of action alleged by Campbell against Defendant, the Honorable Linda Ruthardt, Commissioner

of the Massachusetts Division of Insurance in the above-styled and numbered class action case be, and the same hereby are, dismissed without prejudice. This Order shall have no force or effect on Campbell's claims and causes of action against the remaining defendants.

SIGNED this 29th day of May, 2001.

/s/ David J. Folsom
UNITED STATES DISTRICT JUDGE

APPENDIX E

MA ST 155 § 3

§ 3. Acts of incorporation and corporate organizations subject to legislative action

Every act of incorporation passed since March eleventh, eighteen hundred and thirty-one, shall be subject to amendment, alteration or repeal by the general court. All corporations organized under general laws shall be subject to such laws as may be hereafter passed affecting or altering their corporate rights or duties or dissolving them. Corporations shall, notwithstanding such repeal or dissolution, be subject to sections fifty-one and fifty-two. Such laws of amendment, alteration or repeal or such dissolution shall not take away or impair any remedy which may exist by law consistently with said sections against the corporation, its members or officers, for a liability previously incurred.

APPENDIX F

MA ST 175 § 19E

§ 19E. Conversion from mutual to stock company

Upon compliance with the requirements and completion of the proceedings prescribed by this section, a domestic mutual life insurance company may (i) convert into a domestic stock life insurance company or (ii) so convert as part of a plan of reorganization in which a majority or all of the common shares of the domestic stock life insurance company is acquired by a parent corporation or another corporation which may be, but need not be, a corporation organized for such purposes and may be a subsidiary or other affiliate of such domestic mutual life insurance company prior to such acquisition, and, in either case, may merge as part of the plan of demutualization with a domestic stock life insurance company or a corporation organized under chapter one hundred and fifty-six B and the consideration to be provided in such merger may be shares of the resulting or surviving corporation or any other corporation, cash, or other consideration. Any such merger shall be authorized under this section and approved as provided under paragraph (2) and not pursuant to section nineteen A.

Such conversion shall be accomplished pursuant to a plan which complies with the following:

(1) Such plan shall be filed with the commissioner and shall be approved by him as conforming to the requirements of this section and as not prejudicial to the policyholders of such company or to the insuring public, after a hearing thereon for which notice was given to the insurer, its directors, officers, employees and policyholders,

all of whom shall have the right to appear and be heard at the hearing.

(2) Such plan shall be approved by vote of not less than two-thirds of the votes of the insurer's policyholders voting thereon in person, by proxy or by mail at a meeting of policyholders called for that purpose pursuant to such reasonable notice and procedure as may be approved by the commissioner. Upon such approval, the conversion shall be effective as of the date specified in the plan. On and after such date, all the rights, franchises and interests of the insurer in and to every species of property shall be vested in the converted insurer without any deed or transfer and the converted insurer shall succeed to all the obligations and liabilities of the insurer.

(3) In exchange for all membership interests in the company, such plan shall give each eligible policyholder appropriate consideration. Said consideration shall be determinable under a fair and reasonable formula approved by the commissioner, and shall be based upon the insurer's entire surplus as shown by the insurer's financial statement most recently filed with the commissioner pursuant to section twenty-five, including all voluntary reserves but excluding contingently repayable funds and outstanding guaranty capital shares at the redemption value thereof, and without taking into account the value of nonadmitted assets or insurance business in force.

(4) Such plan shall give each eligible policyholder a preemptive right to acquire his proportionate part of all of the proposed capital stock of the insurer or of the proposed parent corporation or other corporation within a designated reasonable period, and to apply upon the purchase thereof the amount of his consideration, as determined

under paragraph (3), except that the plan may provide that a policyholder may not purchase or receive stock pursuant to this section if it has an aggregate subscription price of two thousand dollars or less and that such preemptive right will not apply to policyholders who reside in jurisdictions in which the issuance of stock is impossible, would involve unreasonable delay or would require the insurer to incur unreasonable costs; provided, however, that any such policyholder shall receive his consideration in cash; and, provided further, in the instance of a plan of reorganization in which the appropriate consideration received by eligible policyholders under paragraph (3) is stock of a corporation in a transaction authorized under this section, or other consideration as approved by the commissioner or, without limiting the generality of the foregoing, as permitted under this paragraph (4) the plan shall provide either (i) that no policyholder shall have any preemptive right to acquire any of the proposed capital stock of the insurer or of the proposed parent or other corporation or (ii) for preemptive rights on such other terms as approved by the commissioner. Notwithstanding the above, the commissioner retains the full authority to disapprove such plan in accordance with the provisions of paragraph (1).

(5) The policyholder eligible to participate in the distribution of consideration and to purchase stock shall be the person whose name appears on the conversion date on the insurer's records as owner of a policy under which there is a right to vote and which, on both the December thirty-first immediately preceding the conversion date and the date the insurer's board of directors first votes to convert to stock form, is in full force for its full basic benefits with no unpaid premium or consideration at the

expiration of any applicable grace period, or which is being continued under a nonforfeiture benefit and continues to be eligible for participation in the insurer's annual distribution of divisible surplus.

(6) Shares are to be offered to policyholders at a price not greater than to be thereafter offered under the plan to others.

(7) Such plan shall provide for payment to each policyholder of consideration which may consist of cash, securities, a certificate of contribution, additional life insurance or annuity benefits, increased dividends or other consideration or any combination of such forms of consideration.

(8) Such plan, when completed, shall provide for the converted insurer's paid- in capital stock to be in an amount not less than the minimum paid-in capital stock and the net cash surplus required of a new domestic stock insurer upon initial authorization to transact like kinds of insurance.

(9) The commissioner shall find that the insurer's management has not, through reduction in volume of new business written, or cancellation or through any other means sought to reduce, limit or affect the number or identity of the insurer's policyholders to be entitled to participate in such plan or to otherwise secure for the individuals comprising management any unfair advantage through such plan.

Nothing in this section shall be deemed to prohibit the inclusion in the conversion plan of provisions under which the individuals comprising the insurer's management and employee group shall be entitled to purchase for cash at

the same price as offered to the insurer's policyholders, shares of stock not taken by policyholders on the preemptive offering to policyholders, in accordance with such reasonable classification of such individuals as may be included in the plan and approved by the commissioner.

The conversion plan may also include provisions restricting the ability of any person or persons acting in concert from directly or indirectly offering to acquire or acquiring the beneficial ownership of ten percent or more of any class of common stock of the converted insurer or the parent corporation or other corporation.

No director, officer, agent or employee of the insurer, or any other person, shall receive any fee, commission or other valuable consideration whatsoever, other than their usual regular salaries and compensation, for in any manner aiding, promoting or assisting in such conversion, except as set forth in the plan approved by the commissioner. This provision shall not be deemed to prohibit the payment of reasonable fees and compensation to attorneys at law, accountants and actuaries for services performed in the independent practice of their professions, even though also directors of the insurer.

For the purposes of determining whether a conversion plan meets the requirements of this section and any other relevant provisions of this chapter, the commissioner may employ staff personnel and outside consultants. All reasonable costs related to the review of a plan of conversion, including those costs attributable to the use of staff personnel, shall be borne by the insurer making the filing.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TEXARKANA DIVISION

MICHAEL A. CAMPBELL, individually and on behalf of other similarly situated former policyholders of John Hancock Mutual Life Insurance Company,	§	
PLAINTIFF,	§	**CIVIL ACTION NO. 501CV048**
v.	§	**CLASS ACTION**
JOHN HANCOCK FINANCIAL SERVICES INC., JOHN HANCOCK LIFE INSURANCE COMPANY, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and the HONORABLE LINDA RUTHARDT, Commissioner of the Massachusetts Division of Insurance,	§	
DEFENDANTS.	§	

CLASS ACTION COMPLAINT

(Filed Feb. 6, 2001)

Introduction

1. This class action is brought on behalf of the former policyholders of John Hancock Mutual Life Insurance Company ("JHM"), against John Hancock Financial

Services, Inc., a Delaware corporation, and its wholly owned subsidiary, John Hancock Life Insurance Company. This action alleges that the implementation of JHM's Plan of Reorganization, which converted it from a mutual life insurance to a stock life insurance corporation (the "Plan"), was an unconstitutional "taking" and "impairment" of former JHM Policyholders' ("Policyholders") ownership interests in JHM and in their JHM insurance contracts, in violation of the "Takings Clause" of the Fifth and Fourteenth Amendments; and the "Impairment Clause" of Article I, Section 10 of the United States Constitution. Under the Plan, Policyholders' ownership interests were taken by the joint participation of the Commonwealth of Massachusetts and the Hancock entities (as state actors in this transaction), but Policyholders were not provided "just compensation" for this taking. Policyholders seek damages from Hancock to obtain the "just compensation" to which they are entitled.

Jurisdiction And Venue

2. Jurisdiction and venue in this Court are proper under 28 U.S.C. § 1343. Each of Plaintiff's six causes of action is based on 42 U.S.C. § 1983.

Parties And Others

3. Representative Plaintiff, Michael A. Campbell, was a participating policyholder of JHM, previously a Massachusetts mutual insurer. Mr. Campbell resides in the Eastern District of Texas.

4. Defendant, John Hancock Financial Services, Inc. ("JHFS"), is a stock company organized pursuant to

Delaware law. JHFS is the parent corporation of John Hancock Life Insurance Company ("JHLIC"). After JHM's conversion, JHFS came into existence as a publicly traded holding company that owned all of the shares of the JHLIC. For purposes of this lawsuit, JHFS was the vehicle used by the Commonwealth of Massachusetts and JHM to distribute a portion of the asserts of JHM to persons who were not formerly JHM policyholders. Unless the context indicates otherwise, the term "Hancock" will refer to JHFS and JHLIC together.

5. Defendant, John Hancock Life Insurance Company ("JHLIC"), is an insurance company owned and operated by JHFS with a principal place of business at John Hancock Place, Boston, Massachusetts 02116. JHLIC came into existence pursuant to the terms of the Plan.

6. John Hancock Mutual Life Insurance Company ("JHM") was a mutual insurance company incorporated and chartered under the laws of Massachusetts with its principal place of business at John Hancock Place, Boston, Massachusetts 02116. JHM is no longer in existence, but all its obligations have been assumed by JHFS, JHLIC, or both, i.e., Hancock.

7. The Honorable Linda Ruthardt is the Commissioner of the Massachusetts Division of Insurance (the "Commissioner").

8. Similarly situated Policyholders timely provided written objections to JHM's demutualization Plan when it was submitted to the Commissioner for public review, and they testified at a hearing intended to consider such objections. On December 9, 1999, the Commissioner issued a decision approving the Plan and rejecting all objections of the Policyholders.

JHM Policyholders Owned And Controlled The Company Under A Charter Which Legislatively Enabled JHM To Operate As A Mutual Insurer

9. Members of JHM have contractual rights under a Massachusetts legislative charter granted to JHM in 1862 (the "Charter") and under their existing contracts of insurance with JHM. These Charter rights and contract rights were violated by implementation of the Plan. The Plan changed the fundamental operating purpose of JHM from a "mutual company" to a "stock company." The Plan was proposed and approved pursuant to purported authority under Mass. Gen. Laws, c. 175, § 19E (the Massachusetts "Conversion Law").

10. The Charter provided contractual ownership rights to JHM Policyholders. In a mutual life insurance company, the policyholders own and control the company, solely for the purpose of obtaining insurance at cost. A Policyholder's right of ownership vests upon the purchase of a participating policy of life insurance from the mutual company. Under the Charter, JHM Policyholders obtained ownership rights, including the right to: 1) ownership to the exclusion of others, except other Policyholders, and the right to direct corporate operations through voting, including the right to elect management and determine fundamental corporate changes; 2) obtain life insurance at cost; 3) a return of unused premiums in excess of amounts needed to cover losses and expenses; and 4) common equitable ownership of the assets of the mutual enterprise.

11. In addition to corporate ownership rights, Policyholders also obtained contractual rights to "participating contracts" with JHM. A "participating life insurance contract" provides a contractual right to the policyholder to participate in surplus, based upon the experience of

other policyholders of the same class. Mutual insurance companies such as JHM provide life insurance coverage by insuring that the company's assets are adequate to pay insurance claims when they are filed. To meet its legal and economic obligations, a mutual insurer charges premiums such that the expected value of premium payments is in excess of the corresponding value of anticipated benefits and expenses. When assets are more than sufficient, as determined by the mutual's board, portions of policyholders' premiums are returned to the policyholders in the form of dividends. This mutual form of company ownership allows policyholders to obtain insurance protection at cost.

12. The mutual insurer's relationship to its policyholders, because of its duty to provide policyholders with an "at cost" price, is similar to that of a trustee to a beneficiary. A "participating policyholder" shares in the risks, costs and other experience related to other policies of the same class. Participating policies thus provide Policyholders with vested "ownership" rights in JHM.

13. Pursuant to the Charter, JHM was operated as a mutual life insurance company for 138 years. Prior to January 2000, JHM was owned and controlled by approximately 3 million policyholders. JHM, during this extended time period, had accumulated a $4.5 billion dollar surplus. The actual fair market value of JHM as of January 2000 has not been calculated, but it is believed to be several billion dollars.

Only The Commonwealth Of Massachusetts Could Rescind The Charter Or Modify Policyholders' Contractual Ownership Rights, And Such A Taking Could Only Be Conditioned Upon The Payment Of Just Compensation

14. Policyholders' ownership and contractual rights acquired under the Charter cannot be taken or modified except upon express written consent. JHM did not have the power to unilaterally rescind or change Policyholder ownership and contractual rights. The Commonwealth of Massachusetts has the governmental power to take property without consent, but this power is constitutionally conditioned on the payment of just compensation.

15. In 1991, the Massachusetts Legislature enacted a new statute that created a procedure to convert mutual life insurance companies to stock life insurance corporations. Mass. Gen. Laws, c. 175, § 19E (the "Conversion Law").

16. The Conversion Law provides that, upon application of a state chartered mutual insurance company via a plan like the one implemented here by Hancock, the Commonwealth of Massachusetts and the company can agree to rescind the mutual charter granted by the state if certain prerequisites are satisfied, including, *inter alia*:

a. The Plan shall be filed with the insurance commissioner and shall be approved by him as conforming to the requirements of the Conversion Statute and as not prejudicial to the policyholders or insuring public;

b. The Plan shall be approved by vote of not less than two-thirds of the insurer's policyholders who voted;

c. The Plan shall give eligible policyholders "appropriate consideration" determinable under a fair and reasonable formula approved by the commissioner and which is "based upon the insurer's entire surplus as shown by the insurer's financial statement most recently filed with the commissioner pursuant to section twenty-five, including all voluntary reserves but excluding contingently repayable funds and outstanding guaranty capital shares at the redemption value thereof, and without taking into account the value of non-admitted assets or insurance business in force."

d. The Plan may include provisions restricting the ability of any person or persons acting in concert from directly or indirectly offering to acquire or acquiring beneficial ownership of 10% or more of any class of common stock of the converted stock company; and

e. No director, officer, agent or employee may receive, except if approved by the commissioner, any fee commission or other valuable consideration (other than usual regular salaries and compensations) for in any manner aiding, promoting or assisting in such conversion.

JHM And The Commonwealth Of Massachusetts Agreed To Use The State's Power To Take Policyholders' Ownership Rights And To Modify Policyholders' Insurance Contracts

17. On May 11, 1998, the JHM Board authorized management to prepare a plan to demutualize pursuant to purported authority conferred under the Conversion Law. On August 31, 1999, the Board adopted its so-called "Plan of Reorganization of John Hancock Mutual Life Insurance Company." A copy of the Plan is attached as Exhibit A. Although called a "reorganization," the Plan was effectively a sale of the equity interests of Policyholders' mutual memberships to the now existent publicly traded stock holding company, JHFS, thereby altering JHM's operating purpose.

18. The Plan provided that each Policyholder be allocated consideration consisting of a number of shares in JHFS or their equivalent. The number of shares allocated was based on both a fixed component and a variable component. The fixed component allocated 17 shares for each policy owned by a Policyholder on the Plan's effective date. See Article 7.1 of the Plan (hereinafter references to sections in the Plan are designated simply as "Art."). The variable component allocated a certain number of shares based upon a formula purportedly intended to reflect each participating policy's contributions to JHM's surplus, historically and prospectively. The allocation formula, called "Historic Plus," is based upon an actuarial theory, which tends to allocate more shares to policyholders with more recently acquired policies.

19. The "Historic Plus" formula applied by JHM allocated consideration based, in part, on projected future surplus contributions as opposed to an allocation based

exclusively on historical surplus. The "Historic Plus" method deviates from JHM's own longstanding policy and practice of distributing surplus to Policyholders based upon a historical formula. The "Historic Plus" method is contrary to Massachusetts law in force when JHM was chartered in 1862 and contrary to the Conversion Law as well.

20. The JHM Plan determined the ostensible value of Policyholders' ownership "shares" as of the date of an Initial Public Offering ("IPO") of stock in the newly created JHFS. Art. 5.2, Exhibit A. JHM first transferred all of its assets and liabilities to JHFS, which then sold stock to the public for cash. Art. 5 Exhibit A. JHFS used this cash to purchase the memberships of Policyholders. Art. 7, Exhibit A. JHM thereafter ceased to exist, having been fully absorbed by JHFS. JHFS thereafter became a corporate parent to and owned 100% of the stock in its wholly owned subsidiary, formed from the JHM transfer residue, called John Hancock Life Insurance Company ("JHLIC").

21. The Plan's IPO method for valuing Policyholders' ownership interests in JHM was not designed to value these interests at fair market value because, *inter alia*, an IPO price does not measure fair market value; the market cannot measure fair value, if at all, until a long period of time after the IPO, the Plan contained anti-takeover provisions which suppressed the demand for JHFS stock and thus precluded a fair market valuation; and Morgan, Stanley the lead underwriter involved in determining the IPO price was conflicted by reason of an over allotment option to purchase 15,300,000 JHFS shares at or near the time of the IPO. As a result of these mechanisms, Policyholders' membership interests were significantly undervalued from the requirement of just compensation.

22. Immediately before demutualization, Policyholders owned *100%* of the controlling interest of JHM. Policyholders also had a *100%* interest in JHM's $4.5 billion in surplus and billions in other assets. After demutualization, Policyholders no longer controlled or owned these assets. Moreover, Policyholders were charged millions of dollars in costs and expenses to enable JHM to convert Policyholders' property interests in JHM without their affirmative consent.

JHM And Hancock Acted Under Color Of State Law In Depriving Policyholders Of Property Rights Secured By The Federal Constitution, And Hancock Is, Therefore, Subject To Liability For This Deprivation

23. JHM and Hancock, in implementing the Plan, violated the Fifth and Fourteenth Amendments to the United States Constitution (unconstitutional taking of property) and the Impairment of Contracts Clause (U.S. CONST. art. I, § 10, cl. 1). Each of these constitutional violations provides the basis for a claim under 42 U.S.C. § 1983.[1]

24. JHM and the Commonwealth of Massachusetts are parties to a Charter, under which JHM was authorized to operate only as a mutual life insurance company.

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[1] The Fourteenth Amendment provides that the government shall not take private property for public use without just compensation. The Impairment of Contracts Clause insures that states will not pass any law impairing the obligations of contracts. U.S. CONST. art. I, § 10, cl. 1. A private actor jointly participating with state actors may also be deemed to be a state actor under the U.S. Constitution.

Policyholders acquired substantial property rights under this Charter. JHM and the Commonwealth of Massachusetts knew that if they rescinded or altered the Charter, Policyholders' property rights would be impaired or destroyed.

25. The Massachusetts Legislature nevertheless concluded that a public use (bolstering the financial viability of life insurance companies) for taking policyholders' property rights in mutual insurance companies existed that justified recision of mutual insurance companies' charters, like the Charter, and conversion of privately owned mutual membership interests to publicly held stock ownership interests. It, therefore, enacted the Conversion Law, through which it exercised its power to take the mutual memberships, subject to its constitutional obligation to provide just compensation for the property taken. Under the Conversion Law, the Massachusetts Legislature delegated that obligation to Hancock.

26. Through its Plan, JHM proposed a method by which Massachusetts and JHM would rescind the Charter. Massachusetts approved the Plan and agreed to rescind the Charter. By participating with Massachusetts in this agreement to rescind the Charter and share Massachusetts' governmental power to take property for just compensation, JHM and Hancock, for purposes of this one transaction, became state actors.

27. Massachusetts did have the power to take Policyholders' property without consent, but only upon the payment of just compensation. In addition, Hancock (the private entities, JHFS and JHLIC) did *not* have the power to take Policyholders' property, the mutual memberships, without consent. Under the Conversion Law and the Plan,

Massachusetts therefore authorized Hancock to use its power to take Policyholders' ownership interests and contractual rights. Hancock thus undertook a traditional government function, the taking of property, to allegedly foster a purported governmental interest – maintenance of a mutual insurer's financial viability.

28. JHM elected to convert from a mutual to stock life insurance corporation and thereby repudiated the ownership rights and the right to participating life insurance contracts of its Policyholders, including those of the Representative Plaintiff. By divesting Policyholders of ownership and depriving them of their contractual rights, JHM was obligated to pay them just compensation. Hancock has not provided just compensation and the decision of the Commissioner has purportedly relieved it of this obligation.

29. JHM acted under color of state law in proposing and implementing the Plan and repudiating Policyholders' contracts. JHM, along with Hancock, acting under color of state law, deprived Policyholders of rights secured by Amendment XIV and Article I, Section 10 of the United States Constitution by utilizing the sovereign power of the Commonwealth of Massachusetts to take property, but *without* providing just compensation therefor.

JHM And Hancock Became State Actors Under Massachusetts' Conversion Law In The Demutualization Of JHM

30. Under the Massachusetts Conversion Law, the State Insurance Commissioner: (a) is required to be actively involved and to make a number of discretionary factual findings to ultimately determine whether the

standards of the Massachusetts Conversion Law are satisfied by the private mutual insurer seeking to demutualize; *and* (b) has the right to make the controlling decision to approve any proposed final demutualization plan. Therefore, the Massachusetts Insurance Commissioner was a joint participant in JHM's private decision to demutualize.

31. Massachusetts acted not only as a joint participant in JHM's private decision to demutualize, but also as a joint participant in determining the value of the Policyholders' contractual and voting interests. Hancock and the Commonwealth of Massachusetts used Massachusetts law to value Policyholders' ownership and contractual rights. This valuation method required the Massachusetts Insurance Commissioner to make highly discretionary factual findings under Massachusetts law to determine a final amount to be paid Policyholders in consideration for the termination and/or repudiation of their mutual policies or membership interests.

32. The decision as to whether JHM could demutualize, as required under Massachusetts law, was joint. Neither JHM, Hancock, nor the Commonwealth of Massachusetts could unilaterally engage in or compel demutualization. JHM had to voluntarily join and act in concert with the Insurance Commissioner, since their agreement to demutualize was required under Massachusetts Conversion Law.

33. Under the Massachusetts Conversion Law, JHM and the Commonwealth had to act in concert to finalize the demutualization. However, at all times, JHM had the complete freedom under state law to remain a mutual, private actor, not subject to 42 U.S.C. § 1983 liability.

The State, JHM And Hancock All Participated In The Decision To Rescind The Charter Without Providing Just Compensation Or Protecting Policyholders From Impairment Of Their Contractual Interests

34. In implementing the Plan, the Commonwealth of Massachusetts, JHM and Hancock all, as "state actors," engaged in "taking" Policyholders' property. Therefore, they had a duty to provide Policyholders "just compensation," which means the "fair market value" of the property at the time of the taking. JHM was obligated to provide such just compensation to Policyholders for its repudiation of their property and contract rights.

The Value Provided Was Not Fair Market Value At The Time Of The Taking

35. The Plan did not provide for the payment of "fair market value" at the time of taking, but only discounted, contingent compensation. This compensation was based upon Hancock's initial public offering ("IPO") share price, which represented only a discount to JHM's actual fair market value. Neither JHM nor Hancock has provided just compensation to date.

36. The Plan provided that, in exchange for the sale of their memberships, Policyholders would receive a proportionate share of JHM's aggregate value, as determined by the price of stock in JHFS on the date of its IPO, in the form of cash or policy credits. Art. 7(d), Exhibit A.

37. The Plan inserted "anti-takeover provisions" in JHFS's Charter, by-laws, certificate of incorporation and stockholder rights plan. These provisions prevent the acquisition of JHFS stock in a manner that could interfere with JHFS's Board's and Management's control of the

corporation for a specified period of time. The Conversion Law authorized such "anti-takeover" provisions. G.L. c. 175 § 19E(3). These "anti-takeover" provisions, by their very nature, depress the value of an otherwise freely traded stock company.

38. The Plan denied Policyholders their right to obtain the fair market value of the company, because the anti-takeover restricted IPO did not produce a fair market value price. To obtain fair market value, a mutual insurer should be sold using the auction (free market) process or otherwise implement procedures designed to provide the fair market value to policyholders. The Plan, however, provided for Policyholders to relinquish their legal right of control over JHM, yet deprived Policyholders of receiving the full, undiluted "control premium" aspect of fair market value they would otherwise have realized if JHM were sold in the free market by way of an auction.

39. The Plan did not provide a fair process for the distribution of the full value of JHM to Policyholders. A mutual to stock conversion requires a reasonable period of time for the insurer to adjust to its new stock operation and for the market to determine the insurer's value. Anti-takeover provisions are intended to delay full open market bidding or a hostile takeover of an insurer by prohibiting control premium offers for a period of time. The Plan implemented an unfair process to determine the value of JHM by limiting the valuation to the trading value of JHFS stock on the IPO date; i.e., a single trading day.

40. The process was unfair and improper since the true trading value or fair market value of JHFS stock could not be determined until the expiration of the anti-takeover provisions. The restriction of stock by anti-takeover

provisions caused the stock to be traded at a substantial discount to fair market or going concern value, because, *inter alia*, these provisions precluded willing purchasers from offering Policyholders fair market value.

The Method For Allocating Consideration Impaired Contractual Rights And Deprived Policyholders Of Fair Market Value

41. The Plan provided that each Policyholder would be allocated compensation for his or her membership interests by a certain number of Hancock shares determined by an actuarial formula. The formula allocated shares based on both a fixed component and a variable component. The fixed component allocated 10 shares for each policy owned by a Policyholder on the Plan's effective date.

42. The variable component allocated shares based upon a formula purportedly intended to reflect each policy's past and future contributions to JHM's surplus. The centerpiece of the variable component, the "Historic Plus" formula, is based upon an actuarial theory that allocates more shares for recently acquired policies. The formula thus allocates consideration based, in part, on *projected* future surplus contributions, rather than allocating exclusively based on past surplus contributions, as had been JHM's longstanding practice.

43. The "Historic Plus" formula is contrary to Policyholders' rights under their Charter, because it was *not* based exclusively upon each Policyholder's *past* contribution to surplus, and it was not based upon traditional mutual company operations, which provide that the total

surplus belongs to the then-existing Policyholders based on the amounts they have paid to date. The "Historic Plus" formula deprives Policyholders of the right to compensation based upon the amount of their respective contributions to surplus.

The "Closed Block" Impaired Policyholders' Contractual Rights

44. After the conversion, JHM policies remained in force. The Plan created a so-called "Closed Block," which is a device that contains segregated assets to be allocated to JHLIC to pay claims and provide dividend payments on the existing individual whole life and term policies of the dissolved JHM. Art. 8, Exhibit A. The Plan represents that assets have been allocated to the Closed Block in an amount that will produce cash flows which, together with anticipated revenue to be generated from the Closed Block assets and policies, are anticipated to be sufficient to pay claims and taxes and to provide for the continuation of the 1999 dividend scales if the experience underlying those scales continues. Future benefits of affected policies will be secured and paid by operation of this "Closed Block."

45. The "Closed Block" materially affects Policyholders' existing Charter, contractual and ownership rights in that:

a. Policyholders are no longer owners of JHM;

b. Policyholders no longer have the right to be paid from a surplus in which they have an ownership interest, but will instead only have a contractual right to receive dividends from the segregated assets in the "Closed Block," that they do not own; and

c. Policyholders no longer have the right to control, through election of a Board, those persons who will control the business affairs of the Closed Block.

46. The Plan effectively replaces a Policyholder's contractual "participating policy" with an interest in the "Closed Block." The Plan operates the "Closed block" in a fundamentally different manner than a mutual insurance company manages policyholders' interests. Policyholders are no longer owners of a mutual companies [sic]. Rather, they are now, in essence, mere creditors of JHFS, with JHFS' debt to them secured by the "Closed Block" assets.

47. The "Closed Block" deprives Policyholders of the security provided by their participating policies, because the Policyholders' security and contractual interests underlying the "Closed Block" are quite different than policyholders' security and interest in their own mutual company. The Plan does not provide for administrative expenses. This means that the participating policies will become nonparticipating with respect to expenses, and Policyholders will no longer be able to benefit from cost cutting or expense reductions that would increase dividends. Significantly less assets are required to be segregated in the "Closed Block" by excluding payment of expenses from the "Closed Block."

48. Prior to demutualization, Policyholders owned 100% of a financially sound mutual insurer with a solid earnings record of 138 years. The Plan eliminated Policyholders' ownership and replaced it with an interest in the assets in the Closed Block, which are controlled and operated by JHFS.

49. Prior to demutualization, Policyholders could exercise control by electing a Board. The Plan eliminated this right since the now-existing Hancock Boards now operate JHFS, JHLIC and the Closed Block. Thus, the Closed Block will not be governed by an elected Board, but instead by Hancock and its Board and its Management, who must act in the interest of its stockholders, not in the interest of former JHM Policyholders, with respect to decisions in connection with the Closed Block.

50. Under the Plan, the assets in which Policyholders would otherwise have participated have been dramatically reduced. The costs of administering the Closed Block are no longer paid out of Closed Block funds. Billions of dollars that would have been allocated to the Closed Block are now earmarked for other corporate uses. As a result, the pool of assets in the Closed Block is significantly reduced, and the Policyholders will no longer be able to save or benefit from cost cutting or expense reductions resulting in increased dividends.

51. The Closed Block deprives Policyholders of the security and income provided by their ownership of their own mutual company. The Closed Block constitutes a material revision and deprivation of Policyholders' rights under JHM's now rescinded Charter and their former insurance contracts.

The Plan Impaired Substantial Contractual And Ownership Interests in JHM Without Just Compensation

52. Implementation of the Plan breached Policyholders' contractual rights under their Charter and their life insurance contracts, and eliminated their property rights

without their consent, causing substantial damage. JHM's adoption of the Plan, therefore, was contrary to the Charter.

53. The Charter, which incorporates Massachusetts law, provided that JHM's sole purpose was to provide life insurance coverage on a mutual basis. Under the Charter, Policyholders owned an equitable interest in JHM. The Charter did not authorize implementation of the Plan. The Charter provided that the fair value of JHM should be distributed proportionately to Policyholders upon the surrender of the Charter, sale of JHM assets, or dissolution of the mutual.

54. The plan repudiated the Charter because:

a. The plan prevented JHM from continuing as a mutual company;

b. The plan terminated JHM's owners' rights to a portion of the surplus earned by JHM;

c. The Plan failed to distribute 100% of JHM's value, but instead, limited this value to the anti-takeover restricted IPO price, which prevented the sale of JHM or its assets from being determined in an open market in which JHFS's stock was unrestricted;

d. The Plan utilized a "Historic Plus" formula for allocating proportionate shares to Policyholders that was not authorized by the Charter or Policyholders' contracts;

e. The Plan created a Closed Block that Materially modified the Charter and contractual interests that Policyholders had obtained upon purchase of their JHM policies;

f. The Plan deprived Policyholders of ownership rights by forcing the exchange of their interests in JHM for restricted shareholder interests in a stock company; and

g. The Plan allowed the existing JHM Board and Management, and other stockholders, to obtain control of JHM's surplus and assets at a discount below fair market value.

Class Action Allegations

55. This class action is filed pursuant to Fed.R.Civ.P. Rules 23(a) and 23(b)(1), (b)(2) and (b)(3) on behalf of Policyholders that held JHM policies on or before the implementation of the Plan, but excluding the Defendants and JHM Management and Directors.

56. The Class, which includes approximately 3 million Policyholders, is so numerous that it is impracticable to bring all Policyholders before the court. The exact number of class members is unknown, but can be determined from the records formerly maintained by JHM and now maintained by Hancock. In many instances, Policyholders either are unaware that their claims exist or they have sustained individual damages too small to justify the costs of bringing suit separately. When aggregated, however, Policyholders' damages total, at a minimum, hundreds of millions of dollars.

57. Common questions of both law and fact affect the rights of each member of the Policyholder class, including, *inter alia*:

A. Did the approval of and implementation of the Plan constitute a taking of Policyholders'

property rights, in violation of the Fourteenth Amendment of the Constitution?

B. Did the Plan violate the Impairment Clause of the Constitution?

C. Did Hancock act under the color of state law within the meaning of 42 U.S.C. § 1983?

D. Did the Plan deprive Policyholders of their property rights under the Takings clause of the Fourteenth Amendment of the Constitution by using the "Historic Plus" method to determine the amount of their compensation?

E. Did the Plan deprive Policyholders of their property rights under the Takings Clause of the Fourteenth Amendment of the Constitution by giving them only "*contingent* compensation" based on the price of JHFS stock on the date of its anti-takeover restricted IPO?

F. Did the Defendants, acting individually and in concert, under 42 U.S.C. § 1983, unconstitutionally impair Policyholders' contractual rights, as set forth in their Charter with the Commonwealth of Massachusetts, and their participating policies of insurance?

G. Did the Defendants, acting individually and in concert, unconstitutionally take Policyholders' control and property rights in JHM, without the requisite public use interest that would justify the taking or impairment of contract?

58. Representative Plaintiff, Michael A. Campbell, will assure the adequate representation of all class members. His claims are typical of the class claims. He has no

conflict with class members in the maintenance of this action, and his interests in this action are antagonistic to Defendants' interests. He will vigorously pursue the class claims. He is aware that he cannot settle this action without Court approval.

59. Undersigned counsel, Stanley, Mandel & Iola, L.L.P., are experienced in litigating class actions and have handled many such actions in the state and federal courts for and on behalf of other policyholders. Counsel are handling this case on a contingent basis and will receive compensation for their professional services only as awarded by this Court.

60. A class action provides a fair and efficient method of adjudicating this controversy. The substantive claims of the Representative Plaintiff and the class members will require evidentiary proof of the same kind and application of the same law, since Defendant has treated all class members in a similar and/or identical manner.

61. There are no known unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the class fund will be minimized. Because class members may be unaware that their rights have been violated, or, if aware, would be unable to litigate their claims on an individual basis because of their relatively small damages, a class action is the only practical proceeding.

Causes of Action

COUNT I
(Unconstitutional Taking Resulting from Valuing Policyholders' Ownership Interests On A Less Than Fair Market Value Basis)

62. The foregoing paragraphs are incorporated.

63. The Fifth Amendment to the Constitution provides " . . . nor shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states under the Fourteenth Amendment. This "Takings" clause generally prohibits a state from taking property from one private party primarily for the purpose of benefiting another private party. Private property can be taken and sold to another private party for just compensation, but only when to do so serves a public use.

64. The Commonwealth of Massachusetts and JHM agreed to rescind the Charter and to take the ownership interests of Policyholders and to transfer them to Hancock. Hancock fully participated with the Commonwealth to obtain this objective. This agreement failed to provide Policyholders just compensation or complete compensation by reason of JHM's contract repudiations, and by not providing fair market value to Policyholders at the time of the taking.

65. The Plan provided that each Policyholder was to be allocated a number of shares in JHFS based upon a set formula. The formula allocated shares based on both a fixed component and a variable component.

A. For policyholders electing to be paid in cash or policy credits, they were to be paid at the

higher of (a) the IPO share price; or (b) the average closing share price for the first twenty days of trading, up to 120% of the IPO share price.

B. For policyholders electing payment in stock, the value of their shares was to be determined *by the market*. (Emphasis added.)

66. The payment of cash or shares in JHFS based upon the JHFS anti-takeover restricted IPO price on a single day did not provide fair market value to Policyholders.

67. "Just Compensation" means the payment of fair market value at the time of the taking. "Just Compensation" is *guaranteed*, not contingent compensation based on the market risks and market-depressing device of an anti-takeover restricted IPO. Nor is "just compensation" determined by such an IPO on the first day (and only day) of trading.

68. The Plan's proposed "Closed Block" also failed to provide "just compensation."

69. It is not "just compensation" within the meaning of the United States Constitution "Takings" clause to pay contingent compensation in stock in a newly formed stock company (JHFS) or, alternatively, based on the trading price of the new JHFS IPO stock on only one trading day or by the application of the proposed "Closed Block." This is especially true where, as here, the JHFS stock is deflated because of its "anti-takeover" provisions.

70. The Policyholders have been damaged by not being provided just compensation and are therefore entitled to damages from Hancock under 42 U.S.C. § 1983.

COUNT II
(Unconstitutional Taking Resulting from Valuing Policyholders' Ownership Interests on the Historic Plus Allocation Method)

71. The foregoing paragraphs are incorporated.

72. In 1862, JHM commenced operations in Massachusetts as a mutual life insurance company, pursuant to the Charter.

73. In 1991, the Massachusetts Legislature enacted the Conversion Law, which authorized the conversion of a Massachusetts mutual life insurance company to a stock company. Here, this law was applied retroactively to divest Policyholders of their already vested interests in JHM's surplus and other assets.

74. This divestiture was accomplished in part by provisions of the Plan that allocated each Policyholder consideration for the taking of their membership interests that consisted for a number of shares in JHFS or their equivalent. The number of shares allocated was based on both a fixed component and a variable component. The fixed component allocated 17 shares for each policy owned by a Member on the Plan's effective date. Art. 7.1, Exhibit A. The variable component allocates a certain number of shares based upon a formula purportedly intended to reflect each participating policy's contributions to the company's surplus historically and prospectively. The allocation formula, called "Historic Plus," is based upon an actuarial theory that tends to allocate more shares to policyholders with more recently acquired policies.

75. The "Historic Plus" formula applied by JHM therefore allocated consideration to be paid Policyholders

based, in part, on *projected future* surplus contributions. The Historic Plus method deviated from JHM's own longstanding policy and practice of distributing surplus to Policyholders based upon a historical formula. The Historic Plus formula is also contrary to the Charter.

76. JHM's use of a "Historic Plus" method of allocating its assets violated the "Takings" clause of the Constitution. This taking was accomplished through the Commonwealth of Massachusetts', JHM's, and Hancock's joint participation. Policyholders therefore request damages for losses caused by the use of the "Historic Plus" method under 42 U.S.C. § 1983.

COUNT III
(Unconstitutional Impairment of Contract – The Mutual Surplus)

77. The foregoing paragraphs are incorporated.

78. Policyholders each paid for a participating policy in a Massachusetts mutual insurer, JHM. JHM's use of a "Historic Plus" method for distributing its net surplus was: (1) inconsistent with the Charter and (2) inconsistent with JHM's and its Policyholders' interpretation of the Charter from 1862 through 2000 – a time period of about 138 years. JHM therefore had no right to *re*allocate its surplus based on a so-called "Historic Plus" method, which speculates as to surplus to be earned in the future and negates the allocation of surplus based on the surplus in fact "earned by Hancock during the year."

79. Policyholders are therefore entitled to recover damages from Hancock under 42 U.S.C. § 1983 for JHM's

and Hancock's repudiation of the mutual participating Policyholders' interests.

COUNT IV
(Unconstitutional Impairment of Contract – The Policyholders' Right to Vote)

80. The foregoing paragraphs are incorporated.

81. The Fifth Amendment of the Constitution provides that no state shall enact any "law impairing the obligations of contracts. . . . "

82. Under the Charter and their mutual participating policies, Policyholders had ownership and control of JHM.

83. The implementation of the Plan impaired the rights of all JHM Policyholders.

84. To satisfy Massachusetts' demutualization requirement, approximately 3 million Policyholders were provided a two volume Policyholder Information Statement ("PIS") advising them of their right to vote. Only a minority of Policyholders actually voted on the Plan. Most Policyholders did not vote. Thus, the minority of Policyholders voting for the Plan was not even close to a simple majority.

85. JHM knew (or recklessly disregarded the fact) that only a minority of Policyholders would be likely to vote It, therefore, determined that a failure to vote would be disregarded and that only "eligible" Policyholders' votes would be counted. "Eligible" was carefully defined so as to include *only* those few Policyholders that in fact voted and

to exclude the vast majority (i.e., about 2 million) of the other non-voting Policyholders.

86. Hancock's and JHM's impairment of Policyholders' right to vote with respect to the Plan caused Policyholders damages.

87. Policyholders are therefore entitled to recover damages from Hancock under 42 U.S.C. § 1983 for JHM's repudiation of their mutual participating Policyholder interests.

COUNT V
(Unconstitutional Impairment of Contract – To Benefit Special Private Interests)

88. The foregoing paragraphs are incorporated.

89. With the affirmative consent of the Commonwealth of Massachusetts from 1862 to January 27, 2000 (the date of the IPO), Massachusetts allowed JHM to sell Policyholder Membership interests and mutual life insurance policies at cost. Millions of policyholders throughout the country expended billions of dollars to purchase mutual life insurance policies sold by JHM.

90. From 1862 until 1991, a span of 129 years, Massachusetts did not even have an insurance conversion law that would have alerted mutual policyholders that their mutual life insurance policies could be taken from them.

91. As applied here, private parties (JHM and Hancock), have been assisted by the Commonwealth of Massachusetts in repudiating the contracts of mutual life insurance with other private parties – the Policyholders.

Massachusetts, however, cannot constitutionally pass an ex-post facto law that, directly or indirectly, destroys the pre-existing property rights of millions of Policyholders to benefit Hancock and its private investors, without providing just compensation therefor.

92. JHM, Hancock, and the Commissioner of Insurance applied the Conversion Law in violation of the U.S. Constitution by the creation and/or authorization of the Plan which:

A. Violated the state's Charter agreement with Policyholders;

B. Violated JHM's Charter agreement with the Commonwealth of Massachusetts, which was intended to protect and benefit Policyholders;

C. Violated Policyholders' property rights in JHM, which required it to operate as a Massachusetts mutual insurer, and prohibited it from operating as a stock company;

D. Violated Policyholders' control rights in JHM;

E. Violated Policyholders' property rights to purchase insurance from JHM *at cost*;

F. Violated Policyholders' property rights to participate in JHM's future costs and expense savings; and

G. Misappropriated Policyholders' contract and other property rights in JHM's surplus and other assets when JHM and the Commissioner:

(i) Authorized the use of those assets to develop a plan to terminate JHM's operation as a mutual insurer;

(ii) Authorized the use of those assets to pay JHM Management to develop a plan to terminate JHM's operations as a mutual insurer; and

(iii) Authorized the use of JHM's assets to pay outside financial consultants and legal advisors to develop a plan and otherwise advise the JHM Board on how to terminate JHM and to start up a new stock company (JHFS).

93. There was no authority that existed under JHM's Charter that allowed JHM to expend multiple millions of dollars of JHM's surplus and other assets to develop a plan to terminate JHM as a mutual insurer to convert it to a stock corporation.

94. Policyholders are therefore entitled to damages from Hancock for its participation in this scheme to deprive them of their vested interests in JHM under 42 U.S.C. § 1983 for the repudiation of their mutual participating Policyholder interests.

Request for Relief

WHEREFORE, for the foregoing reasons, Plaintiff, Michael A. Campbell, and the putative class of JHM Policyholders, respectfully request that judgment be granted in their favor and in favor of other former mutual Policyholders for any and all damages, attorneys fees, costs and expenses against Hancock as allowed under 42

U.S.C. § 1983 and 42 U.S.C. § 1988. No equitable relief is requested in this case.

A Jury Trial Is Requested.

Respectfully submitted,

/s/ Marc R. Stanley
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APPENDIX H

Division of Insurance

John Hancock Plan of Reorganization Decision

Docket No. F-99-04

Proposed Plan of Reorganization of John Hancock Mutual Life Insurance Company

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DECISION

I. INTRODUCTION

John Hancock Mutual Life Insurance Company ("Hancock") has filed a Plan of Reorganization ("Plan") with the Division of Insurance ("Division"), seeking to convert from a mutual life insurance company to a stock life insurance company pursuant to Section 19E of chapter 175 of the Massachusetts General Laws ("§ 19E"). As the basis for its decision to pursue demutualization, Hancock's Board of Directors determined that reorganization as a stock company would allow Hancock to raise capital to grow its existing businesses and develop new business opportunities, to use stock as currency with which to make acquisitions, and to be able to attract and retain key management personnel.

Under § 19E, both the policyholders and the Commissioner of Insurance ("Commissioner") must approve the Plan before it may take effect. The affirmative vote of two-thirds of the votes cast by policyholders eligible to vote is required to approve the Plan. The Commissioner must hold a hearing on the Plan at which the insurer, its directors, officers, employees, and policyholders have the right

to appear and be heard. Following the hearing, the Commissioner must determine whether the Plan conforms to the requirements of § 19E and is not prejudicial to Hancock's policyholders or the insuring public. Hancock is the second Massachusetts mutual life insurance company to file a reorganization plan under § 19E. On August 2, 1995, the Commissioner approved a plan of reorganization filed by State Mutual Life Assurance Company of America. *Plan of Reorganization of State Mutual Life Assurance Company of America, Findings of Fact, Conclusions of Law and Order*, DOI Docket No. F-95-1 ("*State Mutual*").

If the Plan is approved, Hancock will change its name to John Hancock Life Insurance Company and it will become a wholly-owned stock subsidiary of John Hancock Financial Services, Inc., a newly formed Delaware holding company ("JH Financial"). In exchange for their interests in the mutual company, eligible policyholders will receive compensation in the form of cash, policy credits, or stock in JH Financial. Hancock contemplates completion of an initial public offering ("IPO") of common stock in JH Financial in early 2000. Hancock expects to list the common stock of JH Financial on the New York Stock Exchange under the symbol "JHF." The demutualization will not reduce existing policy or annuity contract benefits, guarantees, values or dividend rights, all of which will remain in full force and effect. In addition, the Plan includes a Closed Block mechanism that will be funded to protect the reasonable policy dividend expectations of individual policyholders with certain dividend-paying policies or contracts.

II. PROCEDURAL HISTORY

In November 1998, the Commissioner, pursuant to § 19E, authorized a Working Group of Division staff members and outside consultants, headed by Julie M. Bowler, First Deputy Commissioner ("Working Group"). The Commissioner charged the Working Group with reviewing on behalf of Hancock policyholders and the insuring public, all of Hancock's proposals. As part of the Working Group, the Division retained outside legal, actuarial and financial experts to provide the independent advice and assistance in evaluating the Plan. Specifically, the Division retained: 1) the actuarial firm of Tillinghast-Towers Perrin ("Tillinghast"), to review the Plans provisions regarding the maintenance of reasonable policyholder dividend expectations, and allocations to eligible policyholders; 2) the accounting firm of PricewaterhouseCoopers LLP ("Pricewaterhouse") to conduct a financial due diligence examination and to monitor Hancock's procedures for preparation and mailing of the package of information to policyholders, and to monitor the policyholder voting procedures; 3) the investment banking firm of Wasserstein Perella & Co., Inc. ("Wasserstein") to review, from a financial perspective, the fairness of the consideration for eligible policyholders as a group; and 4) the law firm of Stroock & Stroock & Lavan LLP ("Stroock") to review the Plan's compliance with § 19E. The Working Group extensively reviewed proposed drafts of the Plan and made numerous recommendations to Hancock and its outside advisers for improvement to the Plan.

The Commissioner appointed Sharon S. Kamowitz, Esq., and Richard A. Cody, Esq., as co-Presiding Officers for the hearing on the Plan. Neither the Commissioner nor the Presiding Officers participated in the Working Group's

analysis of the Plan. Further, the Commissioner instructed all members of the Working Group and others at the Division to maintain a strict policy of not commenting on or discussing the Plan with the Presiding Officers.

The Hancock Board of Directors adopted the Plan on August 31, 1999; Hancock immediately filed the Plan with the Commissioner.

On September 1, 1999, the Commissioner issued a Notice of Public Hearing ("Notice of Hearing" or "Notice") pursuant to the Administrative Procedures Act, G.L. c. 30A and the Formal Rules of the Standard Rules of Practice and Procedure, 801 C.M.R. 1.01 *et seq.*, subject to such modifications as are permitted by law. The Notice scheduled a public hearing to begin on November 17, 1999, and scheduled pre-hearing conferences for October 19 and November 15, 1999. The Notice offered an opportunity for any person to file a written statement concerning the Plan, or to submit a notice of intent to make an oral statement at the hearing. The Notice stated that any person who desired to intervene or participate in the hearing, other than by making a written or oral statement, was required to submit a written request by October 4. The Notice also stated that a copy of the Plan and all of its exhibits was available for inspection at the Division and at Hancock's main office, and that the Plan was posted on the websites of the Division and Hancock.

The Notice of Hearing was published in The Boston Globe, The Worcester Telegram & Gazette, The Springfield Union News, The Berkshire Eagle, The New York Times (National Edition), and USA Today (National Edition) on September 2, 1999. Between September 8 and 15, Hancock mailed a postcard to eligible policyholders informing them

of the proposed demutualization, and advising them to watch their mail for a package of information. The postcard also advised policyholders that they could obtain information through a toll-free telephone number, on Hancock's website, and in a public document room at the Division. Between September 19 and 30, Hancock mailed to eligible policyholders a demutualization package consisting of Policyholder Information Statement, Parts I and II ("PIS"); and Information Guide; and a four-part Policyholder Record, Ballot, Taxpayer Identification, and Cash/Stock Compensation Card. Since September 2, 1999, the policyholders and members of the public have had access to extensive materials related to the demutualization at the Division's public document room and at Hancock's offices.

On September 22, the Presiding Officers ordered Hancock to respond to all letters to the Division submitted by policyholders regarding the Plan, and to file a copy of each response. On October 7, 1999, pursuant to G.L. c. 175, § 206B(e), the Commissioner issued an Order granting a request filed by Hancock on August 13, 1999, for an exemption from the provisions of G.L. c. 175, § 206B(a).[1]

Petitions to intervene were filed by Mutual of America Life Insurance Company ("MOA"); Loretta M. Harhen, Aaron E. Landy, Jr., and the John S. Katzman Family Trust

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[1] G.L. c. 175, § 206B(a) provides that "no person shall . . . acquire control of a domestic insurer or any person controlling a domestic insurer unless, at the time of such [transaction], such person has filed with the commissioner . . . a statement containing the information required by this section and such [transaction] has been approved by the commissioner in the manner [prescribed by this section].

(collectively, "Named Policyholders"), and the Center for Insurance Research, Inc. ("CIR"), and the Brett M. Davis Trust ("Davis Trust"). Hancock filed written oppositions to each petition.

A hearing on the petitions to intervene was held on October 14, 1999. The Presiding Officers orally issued their rulings at the October 19, 1999, pre-hearing conference. The petitions of MOA and CIR were denied in their entirety.[2] The petitions of the Named Policyholders and the Davis Trust were also denied. However, the Named Policyholders and the Davis Trust (collectively, "Participants") were granted participant status in accordance with 801 CMR 1.01(9)(e). As specified in that regulation, participation status carries the rights to submit an *amicus* brief and to argue orally at the close of the hearing. In addition, the Presiding Officers allowed the Participants to offer relevant testimony of previously identified expert witnesses, and to submit written questions, which the Presiding Officers, in their discretion, could to [sic] ask Hancock's witnesses. The Participants were directed to coordinate their evidentiary presentations so as to avoid repetition. On October 27, 1999, the Presiding Officers issued a written memorandum and order setting forth the basis for these rulings.[3]

On November 1, 1999, Hancock filed written direct testimony of its witnesses, Stephen L. Brown, Hancock's

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[2] A request by Hancock that the Commissioner order MOA to resolve its dispute with Hancock through arbitration was also denied as beyond the scope of the hearing.

[3] The full procedural history relating to the petitions to intervene is set forth in that order.

Chairman and Chief Executive Officer; Godfrey Perrott, F.S.A., M.A.A.A., a consulting actuary of Milliman & Robertson; Derek G. Kirkland, Managing Director and co-head of the Global Insurance Group of Morgan Stanley Dean Witter ("Morgan Stanley"); and John M. DeCiccio, Senior Vice President of Hancock. Hancock also submitted exhibits for the hearing. On November 8, 1999, the Participants submitted written direct testimony of their witnesses as well as the exhibits to be introduced at the hearing.[4] The Participants' original list of witnesses included David Schiff, the editor and writer of *Schiff's Insurance Observer*, an independent insurance industry newsletter; James Hunt, an actuary, and former Vermont Commissioner of Banking and Insurance; William Feeley, a Managing Director and Head of Capital Markets of Wit Capital Corporation; and Robert Mendelson, a Senior Vice President and Co-general Counsel of Wit Capital Corporation.

On November 10, 1999, the Participants submitted questions they proposed be directed to Hancock witnesses. On November 12, 1999, Hancock submitted its pre-hearing memorandum. A final pre-hearing conference was held on November 15, 1999. At that conference, the Participants submitted their pre-hearing memorandum as well as additional proposed questions for Hancock's witnesses. Hancock filed objections to the Participants' proposed

[4] The Participants' submissions, as well as their pre-hearing and post-hearing briefs were filed by counsel for the Named Policyholders "in cooperation with" the Davis Trust. This Decision, in discussing the issues raised by the Participants, identifies the policyholder(s) that raised each issue based on the claims made in the petitions to intervene.

questions. In addition, the Participants advised the Presiding Officers that William Feeley and Robert Mendelson had withdrawn their testimony. The Division subsequently received formal notices of withdrawal from Mr. Feeley and Mr. Mendelson, dated November 12, 1999.

The Commissioner and the Presiding Officers conducted the public hearing on November 17 and 18, 1999. Edwin G. Schallert, Esq., of Debevoise & Plimpton, and Bruce E. Skrine, Esq., and James Marchetti, Esq., Hancock's Deputy General Counsel and Senior Counsel, respectively, appeared as counsel for Hancock.[5] Jason B. Adkins, Esq., and Paula Isola, Esq. of Adkins & Kelston, P.C., appeared on behalf of the Named Policyholders. Michael F. Pezzulli, Esq. of Pezzulli & Loewinsohn, LLP, appeared as counsel for the Davis Trust.

Stephen L. Brown presented an opening statement on behalf of Hancock. Following Mr. Brown's opening statement, a number of policyholders and other persons offered comment on the Plan. The Secretary of State of the Commonwealth, William F. Galvin, also made a statement. Counsel for the Named Policyholders and the Davis Trust offered oral statements on behalf of their clients.

Following public comment on the Plan, each of Hancock's previously identified witnesses, Stephen L. Brown, Derek G. Kirkland, Godfrey Perrott, and John M. DeCiccio adopted his pre-filed testimony under oath and presented an oral statement. The Commissioner and the Presiding

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[5] Judith Taft, Esq., and Eileen E. Sullivan, Esq., of Debevoise & Plimpton, and Marylou Fierro, Esq. of Hancock, also represent Hancock.

Officers questioned these witnesses on issues relating to the requirements of § 19E and concerns raised by policyholders.

On November 18, 1999, the Participants presented the testimony of David Schiff and James Hunt. These witnesses adopted their pre-filed testimony under oath. Following direct testimony, Hancock cross-examined the Participants' witnesses, and counsel for the Named Policyholders conducted re-direct examination.

All exhibits offered by Hancock and the Participants were admitted into evidence. In addition, written reports and opinions of Tillinghast, Wasserstein, Pricewaterhouse, and Stroock were received in evidence.

At the conclusion of the hearing, counsel for the Named Policyholders and Hancock delivered closing arguments. The record of the hearing was left open until November 22, 1999, for additional public comment. Hancock was ordered to continue to respond to letters submitted to the Division by policyholders, and to supplement the evidentiary record with these letters and Hancock's responses.[6] On November 23, 1999, Hancock and the Named Policyholders filed post-hearing briefs. On November 24, 1999, we granted Hancock's motion to supplement the record with additional

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[6] The record was also left open for Hancock's filing of an exemption from Section 406(a) of the Employee Retirement Income Security Act of 1974 and Section 4975 of the Internal Revenue Code. Mr. DeCiccio testified that the exemption had been published in the Federal Register, and that Hancock expects to receive the exemption from the United States Department of Labor before the Plan becomes effective. That it has not been received as of the date of this Decision does not affect our conclusions regarding the Plan.

information. On the same day, the Named Policyholders submitted a supplemental post-hearing statement in response to that motion.

On December 3, 1999, following the November 30, 1999, Special Meeting of Policyholders, Hancock reported that 93.72 percent of the 3,425,977 votes cast by approximately 1.1 million policyholders were in favor of the Plan.

III. ANALYSIS OF THE PLAN

Section 19E requires the Commissioner to determine that the Plan satisfies certain requirements. In addition, she must find that the Plan is not prejudicial to Hancock's policyholders or the insuring public. In *State Mutual*, the Commissioner determined that the requirement that the Plan not be prejudicial to policyholders applies to policyholders as a group, and that the Commissioner is, therefore, required to "harmonize the competing interests of individual policyholders." In other words, she need not determine that the Plan is in the best interests of each and every policyholder, a standard that would be impossible to attain.

We will first discuss the specific statutory requirements and issues related to those provisions raised by policyholders. We will then consider the more general issues relating to the determination of whether the Plan, as a whole, is prejudicial to policyholders and the insuring public.

A. Specified Requirements of Section 19E

1. Section 19E(1) – Filing of the Plan and Notice Requirements

Section 19(E)(1) requires that the Plan be filed with the Commissioner and that notice of the hearing on the Plan be "given to the insurer, its directors, officers, employees and policyholders, all of whom shall have the right to appear and be heard at the hearing." The Administrative Procedure Act, which governs the conduct of this hearing, requires that such notice be reasonable and that it sufficiently apprise recipients of the issues involved to afford them a reasonable opportunity to prepare and present evidence and argument. G.L. c. 30A, §§ 10 and 11.

Section 3.2(a) of the Plan requires that Hancock mail or deliver notice of the hearing to persons entitled to appear and the be heard under § 19E at least 30 days prior to the hearing, except in instances where the Commissioner has determined that mailing is not feasible.

In their petition to intervene, the Named Policyholders alleged that the notice to policyholders was deficient, not reasonable, and prejudiced their interests and ability to seek intervention, to retain and prepare witnesses, and to prepare their presentation.[7]

[7] They also argued that policyholders were prejudiced by the fact that Hancock's informational forums were held only in Massachusetts, and that they were conducted after the deadline for policyholders to seek intervention. In our October 27, 1999, Memorandum and Order on

(Continued on following page)

In addition, they argued that they were prejudiced by what they characterize as an "expedited time frame" between issuance of the Notice of Hearing and the November 17, 1999, public hearing. The Named Policyholders did not pursue these arguments in their pre-hearing or post-hearing briefs or at the hearing. Nor do they specifically contend that the Plan does not meet the requirements of § 19E(1).

As discussed above, Hancock filed the Plan with the Commissioner, and the Commissioner issued the Notice of Hearing on September 1, 1999. The Notice was published in four Massachusetts newspapers and two newspapers of national circulation on September 2, 1999. The Notice also was posted on the websites of Hancock and the Division during the first week of September 1999. It was also mentioned by Hancock in a postcard mailed to eligible policyholders between September 8 and 15, 1999, and was included in the policyholder information package mailed by Hancock to eligible policyholders between September 19 and 30, 1999. Hancock and the Division also made early drafts of the Plan available on their websites beginning in November 1998. In addition, the public documents rooms located both at the Division and at Hancock's headquarters

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Petitions to Intervene, we addressed the arguments regarding sufficiency of the notice for purposes of seeking intervention. We note that § 19E does not require informational forums, and that Hancock conducted these forums at the suggestion of the Working Group.

have been open and available to the public during normal business hours since September 2, 1999. We note further that the approximately sixty-day notice was given further in advance of the notice that the Commissioner found to be reasonable in *State Mutual*.

We conclude that the Plan meets the requirements of § 19E(1), and, in addition, that the notice to Hancock, its directors, officers, employees, and policyholders, and the time frame during which these proceedings occurred were reasonable, sufficient, not prejudicial, and afforded a reasonable opportunity to prepare and to present evidence and argument.

B. Section 19E(2) – Policyholder Vote

Section 19(E)(2) requires that the Plan be "approved by vote of not less than two-thirds of the votes of the insurer's policyholders voting thereon in person, by proxy or by mail at a meeting of policyholders called for that purpose." In addition, it requires that the policyholder vote must be upon "such reasonable notice and procedure as may be approved by the commissioner."

The Plan meets this requirement. Section 4.1 of the Plan provides that the Plan "is subject to the approval of not less than two-thirds of the votes of the Voting Policyholders voting thereon in person, by proxy or by mail at the Special Meeting." The Special Meeting of Policyholders was held on November 30, 1999, pursuant to notice that was issued concurrent with the Notice of

Hearing. The final vote count shows that 93.72 percent of the 3,425,977 votes cast by approximately 1.1 million policyholders were in favor of the Plan. In addition, we find that the notice of the vote and the procedures for voting were reasonable.

C. Section § [sic] 19E(2) – Allocation of Consideration

Section 19E(3) requires that "in exchange for all membership interests in the company," a plan of demutualization must provide each eligible policyholder with "appropriate consideration." In addition, it requires that the consideration be determined under "a fair and reasonable formula approved by the commissioner" and that it be "based upon the insurer's entire surplus as shown by the insurer's financial statement most recently filed with the commissioner . . . including all voluntary reserves but excluding contingently repayable funds and outstanding guaranty capital shares at the redemption value thereof, and without taking into account the value of nonadmitted assets or insurance business in force."

Section 7.1(b) of the Plan establishes two elements of consideration for eligible policyholders: a fixed component and a variable component. The fixed component, 17 shares per eligible policy, or the equivalent in cash or policy credits, is designed to compensate policyholders for the cancellation of their

right to vote.[8] The fixed component is expected to comprise approximately twenty percent of the total consideration to be distributed to eligible policyholders, and ensures that all eligible policyholders will receive a minimum amount of consideration.[9]

Under the Plan, only policies with positive actuarial contributions will share in the variable component. The amount of a policyholder's variable component was determined by a methodology that takes into account each policyholder's past contribution to Hancock's surplus as reflected on its most recent annual financial statement, and a projection of that policyholder's future contribution to surplus. In general, this manner of determining consideration is known as the historic-plus prospective methodology ("historic-plus methodology"). The Commissioner approved the use of this methodology in *State Mutual*.

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[8] The number of shares is subject to proportional adjustment under § 9.6 of the Plan.

[9] The amount of the fixed component is not related to the number of votes that are represented by a particular policy, G.L. c. 175, § 94 specifies the number of votes for each policy, depending on the type of policies owned and the amount of insurance or annual annuity income under those policies. Under this section, no policyholder is entitled to more than twenty votes. In its petition to intervene, the Davis Trust contended that it is adversely affected because it is only allowed twenty votes. The Plan's limitation on the number of votes that may be exercised in favor of or in opposition to the Plan is set by statute and is thus not prejudicial.

To carry out the calculations under this methodology, Hancock's business was first categorized into seven major product lines, each containing policies with similar characteristics.[10] Within each product line, a model was created consisting of a series of cells, which in the aggregate, replicate the degree of diversity in the product line.[11] In order to calculate the past contribution to surplus, experience factors for each cell were determined by examining the financial history of each product line on a basis consistent with the manner in which Hancock developed experience factors for pricing and dividend purposes. For the purposes of these calculations, mortality costs, morbidity costs, expense rates, investment returns, the effect of federal income taxes, and other elements were obtained or estimated for a historical period going back, in some cases, more than sixty years. These experience factors were then applied in conjunction with the policy factors applicable to each cell (such as premiums and dividends) to develop the portion of Hancock's assets, as of December 31, 1998, that is associated with the operations

[10] The seven product lines are: individual life insurance, individual annuities, individual long term care, other individual health business, group annuities, group long term care, and group life and other health insurance business.

[11] For individual policies, a cell consists of a given policy type issued to a person of a given age in a given calendar year. For group policies, a cell is either a specific policy if the policy is experience-rated or a collection of policies whose experience is pooled.

of that cell. This amount, minus the statutory liability held by Hancock, as of the same date, with respect to that cell, is the past contribution of the cell. The results were interpolated to arrive at the amount of past contribution for each eligible policy.

To determine the value of each cell's expected future contribution to surplus, experience factors for the future were estimated. For Closed Block business, because the future profit that will inure to Hancock will be determined by the assumptions used at the time the Closed Block was funded, future experience factors were estimated by using the assumptions underlying that funding, with appropriate adjustment for expenses outside the Closed Block.[12] For all other business, the assumptions underlying Hancock's business plan projection were used; the factors were projected into the future based on a continuation of the assumptions underlying the latter years of the business plan projection. The experience factors and the applicable policy factors were then applied to develop the estimated present value of future profits associated with the operation of the cell as of December 31, 1998. The results were interpolated to arrive at an estimated future contribution for each eligible policy.

[12] The Closed Block was funded as of January 1, 1999.

The Named Policyholders and a few people who offered comment regarding the Plan object to the use of the historic-plus methodology. They assert that the historic-only methodology, which takes into account only past contributions to surplus, is required by § 19E(3).

The Named Policyholders specifically claim that the requirement that the consideration "be based upon the insurer's entire surplus as shown by the insurer's financial statement most recently filed" is equivalent to a requirement that consideration be based on known, and not projected data. Therefore, they contend that § 19E(3) precludes the use of the historic-plus methodology because this methodology considers expected or estimated contributions to surplus. They point out that the statute does not reference future or estimated surplus. In addition, they contend that the language in § 19E(3) that requires consideration to be determined "without taking into account the value of nonadmitted assets or insurance business in force" prohibits the reliance upon business plan projections, and good will, and future profits, and thus precludes the use of the historic-plus methodology.

The Named Policyholders also rely on a comparison of § 19E(3) to the demutualization statutes of New York and Maine. They contend that because § 19E(3) is similar to the Maine statute, and because UNUM, a Maine insurer that demutualized in 1986, employed the historic-only methodology, such a methodology is required by § 19E(3).

Further, they rely on the testimony of their actuarial witness, James Hunt, to argue that that the historic-plus methodology used by the Plan unfairly favors newer policyholders over long-term policyholders who, they contend, contributed more to Hancock's surplus.[13] They contend further that policyholders are prejudiced by Hancock's allocation formula because many of the assumptions and data underlying the calculations have not been made available to policyholders. They also contend that the historic-plus methodology produces "strange" results that are not understandable by policyholders.

Finally, the Named Policyholders point out that Hancock's actuarial advisor, Milliman & Robertson, and its legal advisor, Debevoise & Plimpton, both of whom also advised State Mutual in connection with its demutualization, initially advised that company that § 19E(3) requires the use of the historic-only methodology, and then later changed their opinions. The Named Policyholders argue that we should ignore the Commissioner's decision in *State Mutual* because these early opinions were not publicly disclosed during the proceeding on State Mutual's plan of demutualization.

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[13] They also rely on written comments submitted by Joseph M. Belth. However, Mr. Belth was not identified as a Hancock policyholder or as a witness by the Named Policyholders, was not present at the hearing, and was not subject to questioning by Hancock or the Presiding Officers.

In addition, some policyholders, including the Davis Trust, have raised more general questions regarding the allocation methodology. Many policyholders have complained that they do not understand the basis for their allocation and that the allocation does not appear to be fair.

After reviewing the evidence presented, and carefully considering the concerns raised by policyholders, we conclude that the Plan provides each eligible policyholder with "appropriate consideration" in exchange for their membership interests in Hancock, and that the allocation of consideration under the Plan is based upon a fair and reasonable formula.

The decision in *State Mutual* approved the use of the historic-plus methodology under § 19E. The Commissioner determined that the statutory requirements for "appropriate consideration" and for a formula that is "fair and reasonable" do not demand the use of any one method of allocation, but are "consistent with a flexible, rather than a rigid, approach to allocation of policyholder consideration." She concluded that Section 19E(3) "allows for different methods to be employed, depending on the circumstances of the particular demutualization, so long as the formula employed is fair and reasonable in that instance." *State Mutual*, at 44. The decision noted that the use of the historic-plus methodology is supported by the Report of the Society of Actuaries Task Force on Mutual Life Insurance Company Conversion, published in 1987 ("SOA Report"), which states that allocation of policyholder

consideration should be "based primarily on the relative contributions of policyholders to the surplus of the company" and that such contributions should include both past and anticipated contributions. *State Mutual*, at 46. Further, the decision concluded that the phrase "based upon the insurer's entire surplus," applies to the determination of the aggregate consideration, and not to the allocation of such consideration. It noted that § 19E does not require that consideration be based *only* upon the insurer's entire surplus. *State Mutual*, at 46-47, n. 32.

We find no reason to depart from this interpretation of § 19E. Further, we find persuasive Hancock's argument that the interpretation of § 19E offered by the Named Policyholders could preclude paying policyholders a fixed component of consideration because this component, which compensates policyholders for the right to vote, is not based on Hancock's entire surplus. Hancock notes that use of the historic-only methodology would also not result in consideration exactly equal to surplus because the positive and negative contributions of former policyholders are not included in the historic calculation.

The historic-plus methodology has been used in every major United States demutualization since 1990. Furthermore, the assertion of the Named Policyholders that the decision in the UNUM demutualization required use of the historic-only method under statutory language similar to § 19E(3) is unfounded. The Legal Standards Rulings cited in that decision provided that the Maine statute *permitted* the use of an allocation

methodology based exclusively on historic contributions to surplus. *See* Final Decision and Order, *In Re Plan of Recapitalization and Conversion of Union Mutual Life Insurance Company*, at 8 (August 8, 1986).

We are not persuaded by the Named Policyholders' reliance on Milliman & Robertson and Debevoise & Plimpton memoranda that initially supported the use of the historic-only methodology under § 19E for the *State Mutual* demutualization. During his oral testimony, Mr. Perrott offered a credible explanation regarding this issue. Further, the conclusion in *State Mutual* was not dependent solely upon the opinions of either Milliman & Robertson or Debevoise & Plimpton.

As discussed above, the Commissioner's task under § 19E is to determine whether the allocation formula used by Hancock is fair and reasonable, and whether the Plan is prejudicial to policyholders and the insuring public. The record of this proceeding demonstrates that the methodology used to allocate consideration under the Plan meets these criteria.

First, Mr. Perrott testified that the allocation under the Plan has been determined under a fair and reasonable formula and results in appropriate consideration for policyholders. He stated that an allocation based on the historic-only methodology would be less fair than an allocation based on the historic-plus methodology because under the historic-only methodology, many of Hancock's policyholders who bought policies in the last ten years would be deprived

of any variable component of consideration, while owners of policies that had been in existence for a somewhat longer period of time would, on the whole, receive a disproportionate amount of Hancock's distributed value. He noted further, that while the historic-only methodology might have arguably been applicable to State Mutual, it would not be applicable to Hancock. He explained that State Mutual had virtually stopped selling individual insurance ten years before it demutualized, whereas Hancock is still actively selling participating whole life insurance policies.

Because the aggregate consideration is constant, any change in the method of allocation would necessarily provide more consideration to some policyholders and less to others. Mr. Perrott testified that although consideration could be allocated in many different ways (for example, based upon the size of the policy or how long it had been in force), an allocation based upon contributions to Hancock's value "is intrinsically fair" and is "the only basis that is intellectually supportable as fair."[14] He explained that the allocation is based on the total amount of profit that a policy is expected to contribute to Hancock, and that different policies are more or less profitable than other policies, due to, among other things, the level of competition in the marketplace. He noted specifically that

[14] Tr. 4; 162-163.

large policies are often less profitable than smaller policies.

Further, Mr. Perrott's testimony is supported by the SOA Report which states that the historic-only approach has a "serious deficiency as a conversion allocation methodology because it will produce negative contributions for most of a company's current individual policyholders." The report states further, that the historic-only methodology "is not a useful method and the Task Force does not believe it produces a theoretically correct measure of policyholder contributions, in the aggregate or policy-by-policy."[15] We note also that more recently, in May 1999, the Task Force on Allocation of Policyholder Equity of the Life Committee of the Actuarial Standards Board promulgated an Exposure Draft of Proposed Actuarial Standard of Practice, "Allocation of Policyholder Consideration in Mutual Life Insurance Company Demutualizations," which recommends use of the historic-plus methodology.

In addition, Tillinghast reviewed Hancock's allocation of policyholder consideration and, specifically, the use of the historic-plus methodology. It concluded that the method of allocation is fair and reasonable, and that the Plan is fair and not prejudicial to Hancock's policyholders or the insuring public. Wasserstein has also opined that, from a financial perspective, the Plan is fair to policyholders

[15] JHX 27 at 138.

as a group. As discussed above, the *State Mutual* decision concluded that the requirement that the Plan be not prejudicial to policyholders applies to policyholders as a group.

The evidence offered by the Named Policyholders does not refute the conclusion that the allocation formula is fair and reasonable. Although their witness, Mr. Hunt, claims that the allocation formula results are not understandable by policyholders, he testified that the Plan is not unfair to policyholders as a group.[16] In support of the Named Policyholders' claims, he stated only that: 1) he believes that the historic-only methodology is more fair to policyholders than the historic-plus methodology; 2) the use of the historic-plus methodology in other proceedings does not make it more fair; and 3) he does not understand how the authors of the SOA Report determined that the historic-only method would penalize most of a company's current individual policyholders. Mr. Hunt testified that there are valid reasons that would preclude an insurance company from disclosing the complete details of its allocation formula.

Therefore, while we are sensitive to the concern that the allocation formula as applied to eligible policies may be confusing to some

[16] He also testified that Hancock's decision to demutualize "is marvelous for current policyholders" and that he has advised Hancock policyholders "to not let their policies go because they're going to get this windfall." Tr. 5; 144, 157.

lay persons, we conclude that it complies with the requirements of § 19E(3). "[S]imply because a method of allocation favors some policyholders over others . . . does not compel the conclusion that the method is prejudicial to policyholders." *State Mutual*, at 48.

D. Section § 19E(4) – Preemptive Rights

Section 19E(4) requires that the Plan "give each eligible policyholder a preemptive right to acquire his proportionate part of all of the proposed capital stock of the insurer . . . or, without limiting the generality of the foregoing . . . the plan shall provide either (i) that no policyholder shall have any preemptive right to acquire any of the proposed capital stock of the insurer or of the proposed parent or other corporation or (ii) for preemptive rights on such other terms as approved by the commissioner." Section 9.7 of the Plan specifies that policyholders will not have preemptive rights.

The Participants and other policyholders contend that the lack of a preemptive or subscription rights offering in the Plan is unfair because they will be denied participation in any rise in Hancock's stock price.[17]

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[17] Hancock states, in its Post-Hearing Memorandum, at 49, that the policyholders seek a "subscription rights offering, a concept analogous to (and technically a subset of a preemptive rights offering)." We note that, in general, a subscription right is one granted by an issuer to its existing security holders, and that subscription rights are at the issuer's discretion. A preemptive right is a contractual, statutory

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Some of them argue, further, that they are entitled to maintain their proportional ownership in the newly created stock company. We are not persuaded that we should disapprove the Plan on this basis or that we should require Hancock to amend the plan to offer preemptive or subscription rights to policyholders.

Section 9.7 of the Plan provides that no policyholder or other person has any preemptive right to acquire shares of common stock in connection with the Plan. Mr. DeCiccio testified that most major United States demutualizations since 1990 that have provided compensation to policyholders have not included such rights, and we note that they were not required in *State Mutual*. Further, the lack of a preemptive or subscription rights offering does not deny policyholders the ability to purchase stock in JHF Financial.

Section 19E(4) does not guarantee the continuation of proportional ownership into the future. In addition, Hancock's witnesses testified that a preemptive or subscription rights offering would involve significant and costly logistical difficulties, given the approximately three million policyholders. Such an offering would delay the IPO, and would thus, potentially, negatively impact the IPO stock price,

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or charter-granted right of the shareholder to maintain the shareholders' then applicable percentage of the shares outstanding.

which could disadvantage all eligible policyholders. In addition, only a small percentage of policyholders would be likely to have the economic means and interest to participate in such an offering, which would impose costs on all policyholders.

The Participants and others offering comment have suggested that a subscription rights offering could be conducted over the internet. Mr. Kirkland, on behalf of Hancock, testified that such an offering would create logistical complexity and would only be feasible if all Hancock policyholders had access to the internet and if the terms of the IPO disclosure required to be made to potential investors did not change near the time of the IPO. In support of their suggestion, the Participants initially offered testimony of two witnesses from Wit Capital Corporation, but that testimony was withdrawn. Mr. Schiff, on behalf of the Participants, acknowledged that an internet offering would not reach all or even most policyholders and that the Securities & Exchange Commission has issued guidelines making clear that the availability of a prospectus on-line would not be sufficient disclosure for such an offering. Thus, an internet offering would not eliminate the need for mailing millions of copies of offering materials

Therefore, we conclude that the Plan complies with § 19E(4) which does not require a preemptive rights offering by Hancock. In addition, the Plan's lack of a provision for preemptive or subscription rights does not lead us to conclude that Plan is prejudicial

to Hancock's policyholders or the insuring public.

E. Section § 19E(5) – Eligible Policyholders

Section 19E(5) defines a policyholder "eligible to participate in the distribution of consideration" as

> . . . the person whose name appears on the conversion date on the insurer's records as owner of a policy under which there is a right to vote and which, on both the December thirty-first immediately preceding the conversion date and the date the insurer's board of directors first votes to convert to stock form, is in full force for its full basic benefits with no unpaid premium or consideration at the expiration of any applicable grace period, or which is being continued under a nonforfeiture benefit and continues to be eligible for participation in the insurer's annual distribution of divisible surplus.

Section 6.1-6.4, and 7.1-7.4 of the Plan define eligible policyholders as owners of a policy under which there is a right to vote and which was in force on August 31, 1999, and December 31, 1999, assuming a 2000 effective date of the Plan.[18] If the effective date occurs in 2001, the Plan provides that a policy must be in force on August 31, 1999 and

[18] Section 5.2(a) of the Plan states that the Plan will be effective on the IPO closing date.

December 31, 2000 in order to be eligible for compensation. Any policy that is continued under a nonforfeiture benefit and is not eligible to participate in divisible surplus while in that status, is not eligible for compensation.[19]

Based on these definitions, we conclude that the Plan meets the requirements of § 19E(5).

F. Section § 19E(6)

Section 19E(6) requires that the Plan provide that "shares are to be offered to policyholders at a price not greater than to be thereafter offered under the plan to others." The Plan does not include any provision that would contradict this provision. Therefore, we conclude that the Plan meets the requirements of this section.

G. Section 19E(7) – Payment of Consideration

Section 19E(7) requires that the Plan provide for "payment to each policyholder of consideration which may consist of cash, securities, a certificate of contribution, additional life insurance or annuity benefits, increased dividends or other consideration or

[19] As Hancock notes, there is an ongoing dispute with MOA regarding Hancock's determination that MOA's contract is one of reinsurance and is not eligible for compensation. In denying MOA's petition to intervene, we determined that that dispute involves the application of the Plan, but does not raise any issue as to the validity of the Plan itself.

any combination of such forms of consideration."

Section 7.1(a) of the Plan provides that eligible policyholders will receive shares of common stock in JH Financial, cash or policy credits in exchange for their membership interests.[20] Section 7.3(a)(vii) of the Plan requires that policyholders who desire stock instead of cash must affirmatively elect to receive stock by checking off a box on the Cash/Stock Compensation card. Absent such an election, policyholders are assumed to prefer cash compensation. Additionally, Section 7.3(b) of the Plan provides that policyholders who receive cash or policy credits will be entitled to a "top-up" mechanism by which their compensation will be computed as a multiple of the greater of the price per share at which the stock is offered to the public in the IPO, or the average of the closing price of the stock for the first 20 days of

[20] In order to preserve their tax status, the following types of contracts and policies will be eligible solely for policy credits: individual retirement annuity contracts qualified under § 408(b) of the Internal Revenue Code, individual tax sheltered annuity contracts qualified under § 403(b) of the Internal Revenue Code, individual annuity contracts issued directly to a plan participant pursuant to a tax qualified plan under § 401(a) of the Internal Revenue Code, and individual life insurance policies issued directly to a plan participant pursuant to a tax qualified plan under § 401(a) of the Internal Revenue Code. Unless they are eligible for policy credits, the following policies will be eligible solely for cash; policies subject to a creditor's lien (other than a policy loan made by Hancock) or bankruptcy proceeding; policies for which the mailing address of the policyholder is outside the Untied States, and its territories and possessions; and policies for which the mailing address is one at which mail is undeliverable.

trading after the IPO, subject to a cap of 120 percent of the IPO price.

The funds to pay cash to those who do not elect stock will be allocated from the funds raised by Hancock in the IPO and any other transaction described in § 5.2(g) of the Plan. Section 7.3(d) of the Plan describes a set of priorities that will be used to distribute cash consideration in the event that there is insufficient cash to distribute to all policyholders electing to receive cash. Hancock estimates that it will be able to honor cash preferences for policyholders who were allocated up to 65 shares. Mr. DeCiccio testified that default to cash provisions were employed by Guaranty Mutual, Mutual of Canada, and The Equitable Life Insurance Company in their respective demutualizations.

For policyholders who will own fewer than 100 shares of stock, § 7.3(f) of the Plan provides a commission-free sales and purchase program that allows such shareholders either to buy, at prevailing market rates, the number of shares necessary to reach 100 shares, or to sell all of their shares, without incurring brokerage commissions, mailing charges, registration fees, or other administrative expenses. Mr. Kirkland testified that if and when a shareholder decides to sell his or her stock, it is easier and cheaper, and the trade execution better, to trade in so-called "round lots" such as 100-share blocks than it is to trade odd numbers of shares, or "sub-round lots" of stock.

The Named Policyholders claim that the default to cash provision is unfair and prejudicial because, they claim, policyholders with a share allotment of fewer than 65 shares are automatically defaulted to cash, while those whose allotment exceeds that number will automatically be defaulted to stock. They further contend that the Plan and PIS are misleading and prejudicial to policyholders because Hancock does not disclose that approximately eighty percent of Hancock's policyholders will be cashed out, leaving the majority of ownership interests in JH Financial in the hands of institutional investors, or that policyholders receiving cash compensation will realize immediate tax consequences. Finally, these policyholders allege that the PIS and Information Guide are misleading because they do not indicate whether Hancock's board members and managers who are entitled to compensation under the Plan will elect to receive stock or cash. They do not, however, claim that the default to cash, itself, is not permitted under § 19E, or that it is prejudicial to policyholders.

We are not persuaded by their arguments. First, there is no dispute that any eligible policyholder who wants common stock has the opportunity to elect to receive that common stock. The Named Policyholders' contention that policyholders receiving fewer than 65 shares will automatically receive cash, while those receiving more than 65 shares will automatically receive stock, is simply incorrect.

In addition, Hancock has explained that it chose to have cash as the default consideration based on a review of the demographics of its eligible policyholders, many of whom own small face amount "industrial" life insurance policies.

Furthermore, the Plan's "top-up" provision is beneficial to eligible policyholders because it allows those who receive cash or policy credits to share in the benefit of any short-term appreciation in the stock price without being subjected to the down-side risk of stock ownership. We note that, according to Hancock, it is the only insurer to date to offer such a benefit in its demutualization plan.

Mr. Kirkland also testified that the annual administrative cost of servicing a shareholder is approximately $15 per shareholder. Thus, for a policyholder receiving the minimum fixed component of shares, it would cost Hancock nearly $1 per share to service that shareholder. In light of Hancock's expected earnings of $2 per share, Hancock and its financial adviser, Morgan Stanley, concluded that the expenditure of nearly half that amount in shareholder servicing costs would be excessive and not in the best interests of Hancock, its policyholders, or its shareholders. We also are not persuaded that the Plan is misleading because it fails to disclose that a certain percentage of policyholders will be cashed out. Any attempt at disclosure in the Plan or accompanying materials of the number of policyholders expected to be "cashed out" would be speculative because Hancock cannot know or reliably predict the actual

percentage of policyholders who will receive cash. This is especially true given that Hancock has disclosed to policyholders that there is only a certain amount of cash available and that some people who elect cash may have to receive stock instead.

Furthermore, we find that the tax opinion provided by Hancock's counsel discusses the various tax implications for policyholders.

Finally, the Named Policyholders have failed to show why policyholders are prejudiced because the PIS did not disclose whether Hancock's executives and board members who are eligible policyholders under the Plan, have elected to receive cash or stock as their compensation. Pursuant to the Plan, and in accordance with § 19E, for purposes of the demutualization these individuals are treated the same as any other policyholder. Therefore, they will receive only the consideration allocated to them under their respective policies, and would not have made that election prior to the distribution of the Plan to all policyholders.

We conclude that the Plan meets the requirements of § 19E(7). In addition, we find that the default to cash provision is not unfair or prejudicial to policyholders or the insuring public.

H. Section 19E(8)

Section 19E(8) requires that the Plan, when completed, must "provide for the converted insurer's paid-in capital stock to be in an amount not less than the minimum paid-in

capital stock and the net cash surplus required of a new domestic insurer upon initial authorization to transact like kinds of insurance."

The Plan meets this requirement. Section 5.2(h) of the Plan provides that ". . . the Company's paid-in capital stock and net cash surplus shall be equal to an amount not less than the minimum paid-in capital stock and the net cash surplus required of a new domestic stock insurer upon initial authorization to transact like kinds of insurance."

I. Section 19E(9)

Section 19E(9) requires a finding by the Commissioner that Hancock "has not, through reduction in volume of new business written, or cancellation or through any other means sought to reduce, limit or affect the number or identity of the insurer's policyholders to be entitled to participate in such plan or to otherwise secure for the individuals comprising management any unfair advantage through such plan."

The Named Policyholders claim that the Plan violates this section because the migration of life insurance business over the past decade from Hancock to its stock subsidiary, John Hancock Variable Life Insurance Company, constitutes a "de facto demutualization." The Named Policyholders allege that the number of individual life insurance policies written by Hancock "declined approximately 33 percent during the years

1989 through 1997, while the industry generally declined by 22 percent." In addition, they allege that because the Plan does not disclose the consideration which will be granted to management and directors of Hancock in the future, it is impossible to determine whether the Plan secures for them an unfair advantage.

The Named Policyholders have not produced evidence to support their allegation that the shift in business constituted an intentional effort by Hancock to affect policyholders' participation in the Plan. Mr. DeCiccio testified that after Hancock's Board of Directors voted to pursue demutualization, Hancock instituted a series of procedures to ensure that policyholders seeking to terminate their policies received notice of the possibility of demutualization and the potential loss of consideration before becoming ineligible. Further, the Division's legal adviser reviewed those procedures and confirmed that the migration over time to variable and universal life insurance business did not entail a prohibited purpose and was consistent with the overall shift in the life insurance market to equity products.

We are also not persuaded that Hancock's management has sought to secure an unfair advantage. Sections 9.2 and 9.3 of the Plan prohibit the acquisition of JH financial shares by Hancock's officers and directors, and the compensation of its officers, directors, agents and employees for aiding, promoting or assisting in connection with the transactions

contemplated by the Plan. Section 7.1 prohibits the allocation or payment of consideration for any policy issued to an officer or director that was not in force on or before May 10, 1998, the day that the Board of Directors announced its intention to pursue demutualization. Disclosure of any future compensation would be speculative.

Therefore, we find that the Plan complies with § 19E(9).

J. Other Requirements of § 19E

a. *Anti-Takeover Provisions*

Section 19E provides that a conversion plan may include "provisions restricting the ability of any person or persons acting in concert from directly or indirectly offering to acquire or acquiring the beneficial ownership of ten percent or more of any class of common stock of the converted insurer or the parent corporation or other corporation."

Section 9.4 of the Plan states that: 1) no person or entity may directly or indirectly offer to acquire or acquire ten percent or more of the common stock of the holding company or of the stock of Hancock until two years after the IPO; and 2) during the third year following the IPO, no such acquisition of the stock of the holding company or of Hancock may be made without the prior approval of the holding company's Board of Directors and the Commissioner. Section 9.4 thus constitutes as absolute anti-takeover restriction for two years, with an additional restriction

for one year on any hostile takeover of Hancock.

The Named Policyholders claimed in their petition to intervene that the PIS and Information Guide are incomplete, misleading, and deceptive because they do not clearly indicate that the anti-takeover provisions effectively give Hancock's directors and officers "virtually unchecked control" over the company during the period of time when they may also be receiving stock options. They reference § 9.2(b) of the Plan which provides that stock options and stock grants may be awarded to directors or executive officers one year after completion of the IPO.

We are not persuaded that the disclosure to policyholders are inadequate, and there is no evidence that these provisions of the Plan will, in any way, prejudice Hancock's policyholders or the insuring public. Mr. Brown testified that Hancock included the anti-takeover provision in the Plan because it will permit Hancock's Board of Directors to focus its attention on implementing its strategy during the transition period, rather than fending off a possible takeover bid during the post-IPO period when the company does not anticipate showing the degree of profitability generally achieved by a traditional stock company. He stated that because Hancock has not had a history as a stock company it would be difficult for the Board of Directors or anyone else to determine appropriate long-term value of the company until it is seasoned to some degree. In addition, Mr. Brown testified that Hancock's preliminary drafts of the Plan contemplated a six-month

restriction on the award of stock options and grants to directors or executive officers. However, upon the recommendation of the Working Group, Hancock revised § 9.2(b) of the Plan to impose the more stringent one-year prohibition on such awards.

Therefore, we find that the Plan's anti-takeover provisions are authorized by § 19E, and Hancock's disclosure thereof, comply with § 19E. We find further that these provisions are not unfair or prejudicial to policyholders or the insuring public.

K. ***Fees***

Section 19(E) provides that "[n]o director, officer, agent or employee of the insurer, or any other person, shall receive any fee, commission or other valuable consideration whatsoever, other than their usual regular salaries and compensation, for in any manner aiding, promoting or assisting in such conversion, except as set forth in the plan approved by the commissioner." Section 9.3 of the Plan expressly incorporates the requirement, and both Mr. Brown and Mr. DeCiccio confirmed that Hancock's directors, officers and employees receive no special compensation for assisting in the demutualization.

L. ***Costs of demutualization***

Section 19E also requires that all reasonable costs related to the review of the Plan "including those costs attributable to the use of staff personnel" by the Commissioner, must

"be borne by the insurer making the filing." Section 9.11 of the Plan provides for reimbursement of the Division's costs, and Mr. DeCiccio testified that, in fact, the Division's costs are being paid or reimbursed by Hancock or JH Financial. Therefore, we find that the Plan conforms to this requirement.[21]

1. Other Issues

1. The Closed Block

Although not required by § 19E, Sections 8.1-8.5 of the Plan provide for the creation of an arrangement known as a Closed Block to protect the reasonable policy dividend expectations of individual policyholders with certain dividend-paying policies or contracts.

Under the Plan, the Closed Block includes most traditional individual or joint participating life insurance policies and individual term life insurance policies that are in force on the effective date of the Plan. Thus, almost all individual policies which currently receive dividends, or are expected to receive dividends and which are in force on the date that the demutualization becomes effective, are included in the Closed Block. In general, premiums paid by Closed Block policies will be credited to the Closed Block, and benefits and policyholder dividends will be paid out of the Closed Block.

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[21] Hancock has paid these fees into an expendable trust under the auspices of the Massachusetts Office of Consumer Affairs and Business Regulation pursuant to G.L. c. 6, § 6A G.L. c. 24-A, §§ I(a) and 2(h).

The funding of the Closed Block is intended to be sufficient to support the Closed Block, including the continuation of dividend scales payable in 1999, if the experience underlying such scales, including the portfolio interest rate, continues. Accordingly, as of January 1, 1999, Hancock's general account assets were allocated to the Closed Block in an amount that produces cash flows which, together with anticipated revenue from the Closed Block business, is expected to be sufficient to support the Closed Block. In the event that the assets in the Closed Block are insufficient to pay the benefits guaranteed under the Closed Block business, the Plan requires Hancock to satisfy these obligations out of the company's general funds.

Because no new policies will be added to the Closed Block, except under certain limited circumstances, over time the number of policies in the Closed Block will decrease and the Closed Block will disappear and its assets will decrease to zero when the last Closed Block policyholder dies or surrenders his or her policy.

Hancock will continue to allocate dividends to Closed Block business as it would have had there been no demutualization. The aggregate amount of dividends paid to Closed Block policyholders will continue to be determined annually by the Hancock Board of Directors. These dividends will be apportioned annually in accordance with applicable law, applicable standards of actuarial practice and with the objectives of: 1) minimizing disproportionate effects on policyholders who remain in the Closed Block as it decreases in size; and 2) exhausting assets allocated to the Closed Block

with the final payment under the last policy contained in the Closed Block.

The Plan provides for ongoing monitoring of the operation of the Closed Block by the Commissioner.[22] Under the Plan, Hancock must: 1) prepare annual financial statements for the Closed Block, and submit to the Commissioner an opinion on these financial statements furnished by its independent public accountants; 2) submit yearly reports by independent public accountants to the Commissioner concerning Hancock's compliance with the Plan's provisions regarding the operation of the Closed Black; and 3) submit periodic reports of the operation of the Closed Block, which must include the opinion of an independent actuary as to whether Hancock, in setting dividend scales for Closed Block business, has acted in accordance with the provision is of Article VIII of the Plan. Following the submission of the third report on the operation of the Closed Block, Hancock must continue to periodically report on the operation of the Closed Block, but its reports need not include such an actuary's opinion if the Commissioner, at Hancock's request, so permits.

In their petitions to intervene, the Named Policyholders and the Davis Trust alleged that the Closed Block, as currently funded, may not

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[22] The Plan defines "Commissioner" as "the Commissioner of Insurance of the Commonwealth of Massachusetts or such other governmental officer, body, or authority as becomes the primary regulator of the Company's insurance business under applicable Massachusetts law."

meet policyholders' dividend expectations.[23] In addition, the Davis Trust questioned the assumption that future cash flows will be reinvested at 8.33 percent.[24]

No evidence was produced to support these contentions. Mr. Hunt, the Participants' sole witness on this issue, stated that he is not an expert on Closed Block matters, and his testimony focused on alleged nondisclosures regarding Closed Block funding.

Mr. Perrott's testimony and the Closed Block Memorandum set forth, in significant detail, the assumptions used in developing the Closed

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[23] This allegation was repeated at the hearing by one person who also claimed that there could potentially be a number of deceased policyholders whose families have neglected to file a death claim, thus implying that the Closed Block's mortality assumptions may be too low. We note that the Closed Block includes a provision for such claims incurred before January 1, 1999, but not yet reported.

[24] In its petition to intervene, the Davis Trust also suggested that the Commissioner should continue to monitor the Closed Block throughout the life of the Closed Block, and it questioned the impact of the Closed Block for policyholders who opted out of the class action settlement in Duhaime v. John Hancock Mutual Life Insurance Co., 177 F.R.D. 54 (D. Mass. 1997) ("Duhaime"). In their petition to intervene, the Named Policyholders claimed that policyholders and the insuring public would be affected by the fact that future guarantee fund assessments could be made against the Closed Block. We note that the Plan provides for review of the Closed Block by the Commissioner beyond the first three years. In response to issues regarding Duhaime, Mr. Perrott testified that those claims which predate the Closed Block will not be charged to the Closed Block, and that Hancock has established a procedure under which the Closed Block is not charged for any Duhaime settlements beyond what it would normally pay. Finally, we note that Mr. Perrott testified that although guarantee fund assessments are impossible to predict, such assessments flow through the entire dividend scale and are, in his opinion, fair.

Block funding. Mr. Perrott stated that the methodology used to fund the Closed Block was to assume that the 1999 dividend scales would be paid for all future years and to project forward using the experience underlying that dividend scale. He explained that the fact that the 1999 dividend scale may be lower or higher than scales in prior years is irrelevant so long as the relationship between the scale and the underlying experience remains consistent. At the hearing he further explained that "because one of the experience factors underlying the dividend scale is a portfolio interest rate before expenses of 8.33 percent, that assumption was used for the new money rate because it was the only way that the experience underlying the dividend scale will continue to match that which underlies the '99 dividend scale."[25]

Further, Tillinghast reviewed the funding and assumptions underlying the Closed Block, and concluded that the assets allocated to the Closed Block are reasonably sufficient to enable the Closed Block to meet the goals for which it was created. It also concluded that the classes of policyholders included in the Closed Block are appropriate. We note that the plan that the Commissioner approved in *State Mutual* included a Closed Block.

Based on the foregoing, we find that the composition, funding, and proposed operation of the Closed Block are fair, reasonable, and not

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[25] Tr. 4 at 148.

prejudicial to the policyholders or to the insuring public.

- **Hancock's Efforts to Notify Policyholders**

The Named Policyholders assert that the Plan's approval process and vote are flowed because Hancock has been unable to locate many policyholders. The Named Policyholders contend that the absence of notice to these policyholders, and their lack of an opportunity to vote, renders the entire policyholder vote unfair and prejudicial.[26]

In 1998, Hancock began the process of attempting to obtain current addresses for those of its policyholders for whom it knew it did not have a current address. Many of these policies are small industrial policies with face amounts under $1,000, which were often sold door-to-door by agents, who then collected the premiums in person. In 1985, Hancock waived all future premiums for its industrial life insurance business. Therefore, for many years, it has not sent bills to these policyholders or had personal contact with them through its agents.

Mr. DeCiccio testified that Hancock personnel reviewed Hancock's records to create a database of industrial policyholders dating back to the early part of the century. In addition, for monthly debit policies, it mailed address confirmation letters to

[26] The Named Policyholders further contend that because the consideration due to missing policyholders will escheat to the state where the policyholders last resided, which in many cases will be Massachusetts, there is a conflict of interest between the Commonwealth and policyholders. We are not persuaded by this argument.

obtain current addresses. It also engaged the services of an address research vendor to match approximately one million policy records to credit-based databases. Further, on two separate occasions Hancock ran advertisements in 23 different newspapers across the country asking policyholders who had not had contact with Hancock in some time to contact the company. It also posted these advertisements on its website.

As of the date of the mailing of the demutualization packages, Hancock still had no valid addresses for the owners of 400,000 policies. In an effort to reach those policyholders, and with the Commissioner's approval, Hancock mailed a notification letter in lieu of an entire demutualization package, advising recipients of the public hearing and special meeting dates, and informing them how to obtain further information. Hancock found owners of approximately 7,000 more policies through this mailing. Hancock customer service representatives also attended the informational forums in October 1999, and took information for individuals who thought they had an eligible policy but had not received any Plan materials. Hancock is continuing its effort to locate more policyholders.

Preliminary results of Hancock's policyholder vote, as of the date of the public hearing, showed that approximately 94 percent of the votes cast were in favor of the Plan. The percentage of voting by Hancock policyholders exceeds the final voting percentages achieved by Guarantee Mutual, Mutual of New York, and Standard Life in their respective demutualizations. Mr. DeCiccio testified that based on the results as of the date of the hearing, even assuming that all of Hancock's missing policyholders were to vote against

the Plan, the Company still would have more than the necessary two-thirds vote in favor of the Plan for implementation under Section 19E. Final results after the November 30, 1999 special meeting of policyholders show that 93.72 percent of the 3,425,977 votes cast by approximately 1.1 million policyholders were in favor of the Plan.

While we stress the importance of Hancock's continuing efforts to locate policyholders, we find that based on its reporting of votes, the lack of votes from missing policyholders likely would not have had any effect on the final results of the overall policyholder vote on the Plan. Therefore, we find that the absence of votes from the still-missing policyholders does not render the notice and policyholder vote unreasonable or so prejudicial to policyholders or the insuring public as to compel disapproval of the Plan.

- **Adequacy of Plan Disclosures**

The Named Policyholders assert that descriptions in the PIS and Information Guide of policyholders' interests in Hancock are misleading. In addition, in their petition to intervene, they contended that Hancock has not clearly explained that policyholders voting against the Plan still are entitled to receive consideration if the reorganization is approved.[27] As a result, they contend that the Plan is unfair and prejudicial to policyholders.

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[27] In addition, the Named Policyholders contend that the Plan does not make adequate disclosures about the anti-takeover and the default to cash provisions. These issues have been discussed above.

We are not persuaded by these contentions. We note preliminarily, that § 19E requires the Commissioner to ensure that the Plan is not prejudicial to policyholders and the insuring public. It does not specify the scope of the notice or information that an insurer seeking to demutualize must provide to its policyholders. Nor does it require the Plan, which, by its very nature, is complicated document, to be fully comprehensible by each and every policyholder.

a. ***The Description of Policyholder Interests***

The Named Policyholders claim that the descriptions in the PIS and Information Guide of policyholders' interests in Hancock are misleading because they do not state that: 1) Hancock is run for the exclusive benefit of policyholders; 2) policyholders are the owners of Hancock; and 3) policyholders have numerous rights and privileges exceeding the right to vote and share in the surplus from a liquidation. These participants further allege that the Plan is misleading and prejudicial because it fails to inform policyholders that they are giving up "equity" or "proprietary" ownership rights in Hancock and that these rights will be extinguished by the Plan.[28]

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[28] The Named Policyholders reference internal Hancock memoranda and tax opinions from Hancock's counsel that refer to policyholder rights as "interests" in the nature of corporate equity interests." These references were provided in the context of a tax opinion under § 7701 of the Internal Revenue code. That section defines "stock" as

(Continued on following page)

Section 19E(3) refers to policyholders' interests in a mutual insurer as "membership interests." The Plan, Information Guide, and PIS similarly adopt the term "membership interests" to describe policyholders' rights. The PIS and Information Guide each summarize the basic Plan provisions. Each of these documents further refers policyholders to the Plan as the source for more specific details.

Article I of the Plan defines "membership interests" as follows:

"Membership Interest" means, as of the Effective Date, all the rights or interests in respect of each insurance policy and annuity contract of the Company including, but not limited to, any right to vote and any rights which may exist with regard to the surplus of the Company not apportioned or declared prior to the effective Date by the Board for policyholder dividends, including any such rights in liquidation or reorganization of the Company, but shall not include any other benefits, values, guarantees, dividend rights or other rights expressly conferred by an insurance policy or annuity contract.

We find no merit in the Named Policyholders' claim that Hancock's characterization

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including shares in an insurance company and "shareholder" as including an insurance company member. That Congress deemed interests in stock and mutual companies analogous for purposes of taxation under the Internal Revenue Code does not mean they are indistinguishable for all other purposes.

of policyholders' rights is misleading, Hancock's definition of membership rights is consistent with § 19E and with Massachusetts law, which recognizes a distinction between a mutual policyholder's right to share in the annual divisible surplus of the insurer and a shareholder's equity interest in a corporation. *See, Harhen v. Brown,* 46 Mass. App. Ct. 793, 808 n.14 (1999) ("Although policyholders, unlike stockholders in a corporation, do not have an ownership interest that can be transferred to others, they nevertheless have a financial interest in the mutual insurance company."). *See also, Peters v. Equitable Life Assurance Soc'y.*, 200 Mass. 574, 584, (1909) (the relation between an insurance company and a participating policyholder with respect to dividends is not in the nature of a fiduciary relationship but that of a debtor and creditor).

We find that the Plan is not misleading or prejudicial to policyholders or the insuring public in its description of policyholders' interests in Hancock.

b. ***The Right to Receive Compensation Regardless of Individual Vote***

The Named Policyholders also contended in their petition to intervene that the Plan is misleading, deceptive and unfair to policyholders because it does not make clear that policyholders voting against the Plan still are entitled to receive consideration in the event the reorganization is approved. We find no merit in this contention.

The Information Guide sent to all policyholders states that "[i]f our conversion Plan is approved, eligible policyholders will receive compensation in the form of cash, stock or policy credits, without having to surrender any insurance policy or annuity contract benefits, guarantees, values or dividend rights." The Information Guide further states, "You are not required to attend or participate in the Informational Forums, the Public Hearing or the Special Policyholder Meeting in order to continue your policy or to receive your compensation under the Plan." The Information Guide also informs policyholders that;

A "yes" vote means that you approve John Hancock's proposed conversion to a stock company. If the conversion Plan is approved and becomes effective eligible policyholders will receive compensation in the form of stock, cash or policy credits.

A "no" vote means that you disapprove of the conversion Plan, and would like John Hancock to remain a mutual insurance company.

Further, it states that the Cash/Stock Compensation Card "should be completed if you would prefer stock over cash regardless of how you vote on the ballot because the proposed demutualization may be approved by the policyholders."

These selected descriptions of the significance of a vote make it reasonably clear to policyholders that all policyholders will receive compensation in the event the Plan

is approved, regardless of their individual votes for or against the Plan. Therefore, we find that the Plan's descriptions of policyholder eligibility for compensation upon approval of the Plan are not unfair, prejudicial, misleading or deceptive.

c. *The Role of Morgan Stanley Dean Witter*

The Named Policyholders also contend that the information sent to policyholders failed to disclose: 1) that Morgan Stanley is the lead underwriter for the IPO; and 2) the estimated fees Morgan Stanley will earn as a result of the IPO. In addition, they contend that Morgan Stanley's role in the IPO implies that its fairness opinion is biased.[29] We are not persuaded by these arguments. First, Hancock appointed Morgan Stanley as lead manager in September 1999, after Morgan Stanley had delivered its fairness opinion. Therefore, Hancock could not have disclosed this fact in the information sent to policyholders. Mr. Schiff acknowledged that

[29] In support of this contention they rely upon Butler v. Provident Mutual Life Ins. Co., Ct of Common Pleas of Philadelphia County, Civ. No. 9901-0180 (Sept. 17, 1999). That reliance is misplaced. The court in that case conditioned the effectuation of a plan of demutualization on the circulation of a revised policyholder information statement which, among other things, disclosed the financial advisor's compensation and contingency fee arrangements. However, the court based its decision on the fact that the company had not disclosed that its advisors had concluded that a full demutualization was better for policyholders than the partial conversion contemplated by that plan.

the existing fee arrangements were disclosed in the Policyholder Information Statement.

In addition, Mr. Kirkland testified that it is customary for an insurance company's financial advisor in the demutualization also to serve as lead manager for the IPO. In every major Untied States life insurer demutualization since 1986, including the State Mutual demutualization in Massachusetts, the financial advisor that delivered the fairness opinion also was appointed the lead underwriter in the IPO. Moreover, Morgan Stanley's review in connection with rendering its fairness opinion has been supplemented by the independent review conducted by Wasserstein on behalf of the Division. No credible evidence has been presented to show either that Morgan Stanley's or Wasserstein's fairness opinions should be questioned.

- **Additional Issues Raised by Participants.**

During the course of the proceeding, the Participants have raised a number of other issues relating to Hancock's Board of Directors and senior management. In addition, they have made several assertions regarding the accuracy of certain statements and and alleged inconsistencies between the information sent to policyholders and information from other sources. Although the Participants have not pursued these issues, Hancock has offered credible evidence to refute these concerns and to demonstrate that these issues should not preclude us from finding that the Plan is not prejudicial to policyholders.

We note that Hancock has stated that for four years following demutualization, it will: 1) remain domiciled in Massachusetts and thereafter will seek to redomesticate only with the permission of the Commission; 2) keep its home office and primary executive offices located in Boston and will change location only with permission of the Commissioner; 3) maintain Massachusetts as the location where the majority of its employees are based; and 4) maintain its total level of community activity and charitable giving in Massachusetts at no less than its aggregate level during the past three years.

IV. Conclusion

For the reasons stated above, we find and conclude that the Plan of Reorganization, adopted on August 31, 1999 by the Board of Directors of John Hancock Mutual Life Insurance Company complies with the requirements of Section 19E of chapter 175 of the Massachusetts General Laws, and is not prejudicial to its policyholders or the insuring public. Therefore, we hereby approved the Plan of Reorganization.

SO ORDERED.

/s/
Sharon S. Kamowitz, Esq.
Presiding Officer

/s/
Richard A Cody, Esq.
Presiding Officer

Dated: December 9, 1999

AFFIRMED.

/s/
Linda Ruthardt
Commissioner of Insurance

Dated: December 9, 1999

This decision may be appealed to Superior Court pursuant to G.L. c. 30A, § 14.

APPENDIX I

2000 WL 33223223

Superior Court of Massachusetts.

Thomas TIERNEY et al.[1]

v.

John HANCOCK MUTUAL LIFE INSURANCE COMPANY et al.[2]

No. 00-0087 BLS.

Dec. 18, 2000.

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS AND ON THE HANCOCK DEFENDANTS' MOTION TO DISMISS

VANGESTEL.

This matter is before the Court on the parties' cross motions for judgment on the pleadings and on the motion

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[1] Doris G. Marah, individually and on behalf of other similarly situated policyholders of John Hancock Mutual Life Insurance Company.

[2] John Hancock Financial Services, Inc.; John Hancock Life Insurance Company; the following Directors of John Hancock Mutual Life Insurance Company – Stephen L. Brown, Foster L. Aborn, David F. D'Alessandro, Samuel W. Bodman, III, Joan T. Bok, I. MacAllister Booth, Wayne A. Budd, John M. Connors, Jr., Robert E. Fast, Edward H. Linde, Dr. Kathleen Foley Feldstein, Nelson S. Gifford, Michael C. Hawley, E. James Morton, Richard F. Syron and Robert J. Tarr; the following former Directors – Lawrence K. Fish, William L. Boyan, John F. Magee and Chester V. Vappi; and Hon. Linda Ruthardt, Commissioner of Insurance. Except for Commissioner Ruthardt, all of the parties named in this note, along with the John Hancock Mutual Life Insurance Company, are collectively referred to herein as the "Hancock defendants."

of the Hancock defendants to dismiss the amended complaint (hereafter the "complaint"). In Count I, plaintiffs seek judicial review pursuant to G.L.c. 30A, § 14(7) of a decision by Massachusetts Insurance Commissioner Linda Ruthardt ("Commissioner") approving the plan (the "Plan") of John Hancock Mutual Life Insurance Company ("JHM") to convert from a privately held mutual insurance company to a publicly traded stock company. Plaintiffs, who are policyholders and ex-members of JHM, argue that in approving the conversion plan, the Commissioner failed to provide them with just compensation for their ownership and property rights in JHM. The plaintiffs seek to have the entire conversion plan set aside. Specifically, plaintiffs allege that the Commissioner erred in her interpretation and application of G.L.c. 175, § 19E, the Massachusetts mutual insurance company conversion law ("§ 19E"). All defendants respond that they are entitled to judgment on the pleadings because plaintiffs have failed to satisfy the G.L.c. 30A, § 14(7) requirements for a Court to set aside or modify an administrative agency decision.

The complaint also includes claims against the Hancock defendants for breach of contract (Counts II through VII); breach of fiduciary duty (Count VIII); violation of G.L.c. 175, § 19E (Count IX); and violation of G.L.c. 93A (Count X). The Hancock defendants have filed a motion to dismiss these counts of the complaint pursuant to Mass.R.Civ.P. Rule 12(b)(1) and (6), arguing that plaintiffs have no standing to bring them, that plaintiffs failed to exhaust their administrative remedies with regard to the issues raised, and that the complaint is moot.

For the following reasons, plaintiffs' motion for judgment on the pleadings is *DENIED* and the Commissioner's

motion for judgment on the pleadings on Count I is *ALLOWED*. Accordingly, plaintiffs' additional claims for relief against the Hancock defendants – based principally on the Commissioner's approval of the demutualization Plan – are without merit. Thus, the Hancock defendants' motion to dismiss is *ALLOWED* also.

THE ADMINISTRATIVE RECORD

The Massachusetts demutualization statute permits a mutual life insurance company to convert to a stock life insurance company. The law requires that the conversion plan be approved by the Commissioner of Insurance as "not prejudicial to the policyholders . . . or the insuring public" and as providing "appropriate consideration" to each eligible policyholder in exchange for relinquishment of rights in the mutual company which is being converted. G.L.c. 175, § 19E(1) and (2).

In 1998, JHM informed the Commissioner of its intent to convert from a privately held mutual insurance company, owned and controlled by its policyholders, to a publicly held corporation. Pursuant to § 19E, the Commissioner authorized a working group (the "Working Group") consisting of Division of Insurance (the "Division") staff members and outside consultants to review all of JHM's proposals on behalf of policyholders and the general public. The Division also retained outside legal, actuarial, accounting and financial experts to provide the Working Group with independent advice and assistance in evaluating the Plan. The actuarial firm of Tillinghast-Towers Penn reviewed the provisions regarding allocations to eligible policyholders and the maintenance of reasonable policyholder dividend expectations; the accounting firm of

Pricewaterhouse Coopers LLP conducted a financial due diligence examination and monitored policyholder voting procedures and JHM's preparations and procedures for providing notice; the investment banking firm of Wasserstein Perella & Co., Inc. reviewed the fairness of the consideration for eligible policyholders as a group; and the law firm of Stroock & Stroock & Lavan reviewed the Plan's compliance with § 19E. The Working Group examined proposed drafts of the Plan and made recommendations for improvements to JHM and its advisors.

On August 31, 1999, JHM management adopted the conversion Plan and, pursuant to § 19E, submitted it to the Commissioner for approval. The Plan called for JHM to become a subsidiary of a holding company, providing eligible policyholders with stock, cash or policy credits in exchange for their interests in the mutual company. Those interests were the right to vote at JHM's annual and special meetings and the right to share in the distribution of the residual value of JHM in the event of a solvent liquidation. These interests are essentially illiquid. The formula adopted by JHM for allocating consideration among its policyholders utilized the so-called "historic plus" methodology, including both fixed and variable components. The fixed component compensated policyholders for the loss of their right to vote regardless of the level of their contribution to JHM's surplus; the variable component, which comprised the majority of the consideration, allocated additional shares to reflect each policyholder's past and projected future contributions to the surplus.

The Commissioner appointed two attorneys as co-Presiding Officers for the public hearing mandated by § 19E. Neither the Commissioner nor the Presiding Officers

participated in the Working Group's analysis of the Plan. The Commissioner instructed all members of the Working Group not to comment on or discuss the Plan with the Presiding Officers. The Commissioner then issued the required notice of public hearing, which was published nationally and mailed to millions of JHM policyholders, employees and others. The Commissioner received numerous written submissions in response to the notice.

On November 17 and 18, 1999, the Commissioner and the two appointed Presiding Officers conducted a public hearing on the Plan. Both plaintiffs submitted written materials; plaintiff Thomas Tierney ("Tierney") spoke at the hearing, as did the attorney for plaintiff Doris Marah ("Marah"). The record of the hearing was left open until November 22, 1999, for additional public comment.

Section 19E requires that policyholders vote to approve a conversion plan. On December 3, 1999, following a November 30, 1999, special meeting of policyholders, JHM reported that 93.72% of the 3,425,977 votes cast by approximately 1.1 million policyholders were in favor of the Plan.

Section 19E also requires the Commissioner to determine that the Plan be not prejudicial to JHM's policyholders or to the insuring public.[3] On December 9, 1999, the

[3] On August 2, 1995, in a similar matter involving State Mutual Life Assurance Co. of America, the Commissioner determined that the requirement that the Plan not be prejudicial to policyholders applied to policyholders as a group, and that the Commissioner was "required to harmonize the competing interests of individual policyholders," not to determine whether the plan was in the best interests of each and every policyholder, which was considered an impossible standard.

Commissioner issued a decision (the "Decision") approving the Plan pursuant to the requirements of § 19E. The Decision, which was based on a review of all the evidence presented to the Commissioner, including the concerns raised by policyholders, presented a detailed discussion of the Plan's compliance with § 19E. The Decision directly addressed specific policyholder concerns about the allocation of consideration.

On January 7, 2000, plaintiffs challenged the Plan, arguing that it did not adequately protect their interests as policyholders because it did not provide them with "just compensation" for their financial interests in the mutual company. Specifically, plaintiffs assert: (1) that the Plan's use of an initial public offering ("IPO") of stock with anti-takeover provisions significantly undervalued plaintiffs' shares; (2) that the Commissioner erred in applying the "historic plus" formula to determine the value of policyholders' shares; and (3) that the Commissioner exceeded her statutory powers by approving a "closed block"[4] conversion that allowed the new insurance company to operate members' insurance contracts as "participating" rather than "nonparticipating."

In her December 9, 1999, Decision, the Commissioner specifically addressed these concerns, finding: (1) that there was "no merit" in plaintiffs' contention that policyholders were proprietary owners of the company; (2) that the Plan provided "each eligible policyholder with 'appropriate

[4] The "closed block" portion of the agreement protects the policy dividend expectations of certain policyholders from the vagaries of the market forces after the capitalization.

consideration' in exchange for their membership interests"; (3) that the Plan's use of the "historic plus" formula was fair and reasonable; and (4) that the proposed operation of the Closed Block was fair and reasonable and not prejudicial to policyholders or the insuring public.

Plaintiffs argue that the decision should be remanded because the Commissioner's approval of the Plan was based on an erroneous construction of § 19E. The Commissioner has issued only one other decision applying § 19E. *See State Mutual Life Assurance Co. of America,* ("State Mutual"), Executive Office of Consumer Affairs, Division of Insurance, Docket No. F-95-1 (August 2, 1995).[5] The plaintiffs claim that some of the decisions made in *State Mutual* were erroneous, and that the Commissioner therefore erred in relying on any of those decisions in this matter.[6]

DISCUSSION

Cross Motions for Judgment on the Pleadings

Judicial review of the Commissioner's findings is basically an appeal governed by G.L.c. 30A, § 14. Claims filed in the Superior Court seeking judicial review of administrative agency proceedings must be resolved through a motion

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[5] Tierney also testified in those proceedings on behalf of three named policyholders who were unavailable to testify.

[6] In *State Mutual,* for example, the compensation to policyholders was determined by an IPO, and consideration was determined on an "historic plus" basis. That plan was not appealed, under the conditions of an August 25, 1995, Settlement Agreement entered into by State Mutual with the Center for Insurance Research and certain policyholders.

for judgment on the pleadings. *See* Superior Court Modified Standing Order 1-96; Mass.R.Civ.P. Rule 12(c). Such judicial review is confined to the administrative record, and the Court may modify or set aside an agency decision only if the agency has made an error that prejudices the appealing party's substantial rights.[7]

In an appeal pursuant to G.L.c. 30A, § 14, the effective appellants, here the plaintiffs, bear the burden of demonstrating a decision's invalidity. *Coggin v. Massachusetts Parole Board,* 42 Mass.App.Ct. 584, 587, 678 N.E.2d 1206 (1997); *Merisme v. Bd. of App. on Motor Veh. Liab. Policies and Bonds,* 27 Mass.App.Ct. 470, 474, 539 N.E.2d 1052 (1989). In reviewing the Decision here, the Court is required to give due weight to the Commissioner's experience, technical competence, specialized knowledge and the discretionary authority conferred upon her. *Flint v. Commissioner of Public Welfare,* 412 Mass. 416, 420, 589 N.E.2d 1224 (1992).

The Court must confine its review to the administrative record, *Cherubino v. Board of Registration of Chiropractors,* 403 Mass. 350, 354, 530 N.E.2d 151 (1988), and sustain the Commissioner's Decision unless it is unsupported by substantial evidence. *Solimeno v. State Racing Commission,* 400 Mass. 397, 509 N.E.2d 1167 (1987);

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[7] The Court may set aside or modify an agency decision that is: in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the agency; based upon an error of law; made upon unlawful procedure; unsupported by substantial evidence; unwarranted by the facts found by the agency on the record as submitted; or arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. G.L.c. 30A, § 14(7).

Hotchkiss v. State Racing Commission, 45 Mass.App.Ct. 684, 695-696, 701 N.E.2d 642 (1998); *Yazbek v. Bd. of App. on Motor Veh. Liab. Policies and Bonds,* 41 Mass.App.Ct. 914, 916 (1996). In other words, to the extent the Commissioner's ruling is one of fact, it stands if supported by substantial evidence. *Dohoney v. Director of the Div. of Employment Sec* 377 Mass. 333, 337 n. 3, 386 N.E.2d 10 (1979); *Buckley v. MCAD,* 20 Mass.App.Ct. 172, 175, 478 N.E.2d 1292 (1985). "Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L.c. 30A, § 1(6); *see Lycurgus v. Director of the Div. of Employment Sec.,* 391 Mass. 623, 627-28, 462 N.E.2d 326 (1984).

The Court may not receive additional evidence, absent the special circumstances set forth in G.L.c. 30A, § 14(5), which do not exist here. Nor is the judicial review a trial *de novo. Southern Worc. Cty. Reg. Voc. Sch. Dist. v. Labor Relations Comm'n,* 386 Mass. 414, 420, 436 N.E.2d 380 (1982). The Commissioner is the sole judge of the weight to be afforded to the evidence before her. *Guarino v. Director of the Div. of Employment Sec.,* 393 Mass. 89, 92, 469 N.E.2d 802 (1984). It is "within the [Commissioner's] discretion to disbelieve the [appellants'] version . . . " *Yazbek, supra,* 41 Mass.App.Ct. at 916, 670 N.E.2d 200.

> The judge does not properly act as a fact finder . . . The [Commissioner] alone functions as the finder of facts . . . The judge's function . . . is to determine whether [she] applied correct legal principles in reaching [her] decision. *Guarino, supra,* 393 Mass. at 92, 469 N.E.2d 802. Thus, the decision of the Commissioner must be affirmed if it is supported by substantial evidence on the record as a whole, taking into account whatever in the record fairly detracts from its

> weight. G.L.c. 30A, § 14(7); *Cohen v. Board of Registration in Pharmacy,* 350 Mass. 246, 253, 214 N.E.2d 63 (1966).

G.L.c. 30A, § 14(7), however, authorizes a Court to set aside, modify or remand an administrative decision if it determines "that the substantial rights of any party may have been prejudiced because the agency decision is based on an error of law."

Here, plaintiffs allege that because JHM's conversion Plan inadequately compensated them for giving up their ownership rights in the mutual company, the Commissioner's approval of the Plan exceeded her authority and constituted an unconstitutional taking of plaintiffs' property. Plaintiffs argue that the Commissioner erred as a matter of law because the Plan's determination of "appropriate consideration" was prejudicial to policyholders. Plaintiffs contend that they were prejudiced by the Plan's reliance on an IPO with anti-takeover provisions and by the Plan's utilization of the "historic plus" formula.

Since judicial review of the Commissioner's Decision is confined to the administrative record, the Court may "not make a de novo interpretation of the facts or draw different inferences from the [Commissioner]." *Vaspourakan Ltd. v. Alcoholic Beverages Control Commission,* 401 Mass. 347, 351, 516 N.E.2d 1153 (1987). G.L.c. 175, § 19E(1) requires that a plan approved by the Commissioner must conform "to the requirements of this section." Thus, the first task for this Court is to determine whether, based on the administrative record, the Plan approved by the Commissioner conformed to the requirements of § 19E.

Certain subsections of the statute set forth specific procedural requirements:

that a public hearing be conducted and that proper notice of the hearing be given to the insurer, its directors, officers, employees and policyholders, all of whom shall have the right to appear and be heard (subsection 1);

that the plan be approved by a vote of not less than two-thirds of the insurer's policyholders voting in person, by proxy or by mail at a meeting called for that purpose pursuant to such reasonable notice and procedures as may be approved by the commissioner (subsection 2);

that the plan give each eligible policyholder a preemptive right to acquire his proportionate part of all of the proposed capital stock, (subsection 4);

that shares be offered to policyholders at a price not greater than thereafter offered to others under the plan (subsection 6); and

that the plan provide for payment to each policyholder of consideration (subsection 7).

The administrative record reflects that the Plan complied with all of these statutory requirements. Review of the Commissioner's Decision indicates that she acted in all respects in accordance with these procedural directives. The Commissioner authorized a Working Group including Division staff and outside consultants to review JHM's proposals, involving legal, accounting, financial and actuarial experts; she conducted a public hearing and provided proper notice of that hearing; the Plan was approved by substantially more than two-thirds of JHM voting policyholders; policyholders had a choice of receiving cash, stock or premium discounts for their interests; stock was offered to policyholders at a price not greater

than that offered to others; and the Plan provided for payment of consideration to each policyholder.

In addition to these procedural requirements, certain subsections of the statute entrust evaluative judgments to the discretion of the Commissioner. Thus, pursuant to subsection (1), the Commissioner must determine that a proposed plan is "not prejudicial to the policyholders of such company or to the insuring public." In addition, subsection (3) requires the Commissioner to ensure that policyholders receive "appropriate consideration" for their membership interests in the company, "determinable under a fair and reasonable formula approved by the Commissioner." These discretionary judgments are challenged by the plaintiffs.

In reviewing the Decision, "the [C]ourt shall give due weight to the experience, technical competence, and specialized knowledge of the [Commissioner], as well as to the discretionary authority conferred upon [her]." G.L.c. 30A, § 14(7). If, however, the reviewing Court determines that the Decision was based upon an error of law, the Court may refuse to support it. *See Van Munching Co. v. Alcoholic Beverage Control Comm'n,* 41 Mass.App.Ct. 308, 310-11, 670 N.E.2d 401 (1996), where the Court recognized its obligation to give "due weight to the [ABCC's] experience, technical competence and specialized knowledge, as well as to the discretionary authority conferred upon it."

In *Van Munching,* however, the language of the statute specifically prohibited discounts with a discriminatory purpose, so the Court found that the statute did not give the ABCC the discretion to determine whether a non-discriminatory discount was otherwise fair or reasonable. Here, in contrast, G.L.c. 175, § 19(E) gives the Commissioner

very broad discretion in deciding whether or not a proposed demutualization plan is fair. The Commissioner is, in fact, charged with determining whether or not a proposed demutualization plan is "prejudicial" to policyholders or to the insuring public and whether the plan provides policyholders with "appropriate consideration" for their membership interests, based on "a fair and reasonable formula." Thus, the statute specifically grants the Commissioner the discretion to evaluate the overall fairness of a proposed plan. This case, therefore, clearly is distinguishable from *Van Munching,* in which the Court found that the ABCC's decision contradicted the plain language of the statute. Here, where the Commissioner exercised discretion explicitly granted to her by G.L.c. 175, § 19E, this Court finds no error of law.

The plaintiffs also maintain that the Commissioner abused her discretion in finding that the Plan provided them with appropriate consideration for their interests in the mutual company. First, they argue that the Commissioner's reliance on an IPO containing anti-takeover provisions to determine the value of plaintiffs' interests unfairly depressed the value of those interests. Second, they contend that the statute prohibited the Commissioner from relying on the "historic plus" methodology, asserting that the wording of § 19E(3) required the use of the "historic only" formula. Finally, they challenge the Plan's provisions regarding the operation of the Closed Block.

IPO with Anti-takeover Provisions

Where the use of an anti-takeover provision is specifically authorized by § 19E(9), the decision to couple such a

provision with an IPO falls squarely within the Commissioner's discretion under the statute.[8] This Court must defer to the Commissioner's interpretation of her statutory mandate, as long as the interpretation is plausible. *See LeBeau v. Dept. of Employment and Training,* 422 Mass. 533, 537, 664 N.E.2d 21 (1996). In reviewing the Commissioner's Decision under G.L.c. 30A, the Court must determine whether that Decision is supported by substantial evidence – "such evidence as a reasonable mind might accept as adequate to support a conclusion." *New Boston Garden Corp. v. Board of Assessors of Boston,* 383 Mass. 456, 466, 420 N.E.2d 298 (1981). It makes that determination here. The amount of evidence before the Commissioner was far more than adequate to support her conclusions.

Historic Plus Allocation

Plaintiffs challenge the use of the "historic plus" method to allocate consideration to policyholders, arguing that the wording of the statute prohibits the inclusion of any criteria based on estimates of future experience. The statute states:

> In exchange for all membership interests in the company, such plan shall give each policyholder appropriate consideration. Said consideration shall be determinable under a fair and reasonable formula approved by the commissioner, and

[8] Plaintiffs acknowledge that § 19E(9) authorizes the use of an antitakeover provision in a demutualization plan, because such a provision protects shareholders by preventing a third party from acquiring the company at an artificially low price.

> shall be based upon the insurer's entire surplus as shown by the insurer's financial statement most recently filed with the commissioner . . . including all voluntary reserves but excluding contingently repayable funds and outstanding guaranty capital shares at the redemption value thereof, and without taking into account the value of nonadmitted assets or insurance in force.

G.L.c. 175, § 19E(3).

Plaintiffs contend that this language required the Commissioner to utilize the "historic only" methodology, which bases the allocation to policyholders on a company's surplus on a specific day before the conversion. Plaintiffs argue that because the statutory language excludes the value of "insurance in force," the Commissioner improperly approved the use of a formula that included estimated future contributions to surplus. Plaintiffs contend that the Commissioner did not have the statutory discretion to approve just any fair and reasonable formula, but only a formula based on historic criteria.

"Where the Legislature has not imposed specific restrictions on the reasonable methods by which an agency may carry out its mandate in the plain language of the agency's enabling statute, it is not appropriate for the courts to order the agency to follow specific methods for meeting the agency's mandate." *Mass. Coalition for the Homeless v. Sec'y. of Health & Human Services*, 422 Mass. 214, 223, 661 N.E.2d 1276 (1996), quoting *Williams v. Sec'y. of Executive Office of Human Servs.*, 414 Mass. 551, 570, 609 N.E.2d 447 (1993). A Court may not tell a person in the Commissioner's position how to fulfill her legal obligation unless "there is but one way in which the

obligation may properly be fulfilled." *Matter of McKnight,* 406 Mass. 787, 792, 550 N.E.2d 856 (1990). Where the plain language of the statute does not mandate that the Commissioner utilize a particular methodology to determine appropriate consideration, the decision of which allocation formula to use was within the Commissioner's discretion, and that discretion was properly exercised here.

Closed Block

The plaintiffs suggest that the Closed Block, as funded under the Plan, may not meet policyholders' dividend expectations. The Commissioner found, however, that plaintiffs failed to introduce evidence to support this assertion. The Closed Block included almost all individual policies that would receive dividends after the demutualization. The premiums paid under those policies would be credited to the Closed Block, and all benefits and dividends would be paid out of the Closed Block. To the extent that these assets were insufficient to pay benefits guaranteed under the Closed Block, the Plan provided that JHM satisfy these obligations out of its general funds. Moreover, the Plan provides for the Commissioner's ongoing monitoring of the operation of the Closed Block to ensure that policyholders' expectations are met.

If a Court finds that an agency decision is based on sufficient evidence, the "court may not displace an administrative board's choice between two fairly conflicting views, even though the court might justifiably have made a different choice had the matter been before it *de novo.*" *Vaspourakan. Ltd. v. ABCC, supra,* 401 Mass. at 351, 516 N.E.2d 1153. Here, the Commissioner had the statutory

authority to determine whether the Plan provided policyholders with "appropriate consideration," and the record reflects that her determination on this point was based on substantial evidence. The Commissioner's Working Group of Division staff and outside financial, actuarial and legal consultants reviewed JHM's proposals for her. These experts, most of whom were independent, evaluated the very Plan provisions that are now being challenged by the plaintiffs, including the reasonableness and fairness of the allocations to policyholders and the adequacy of the Closed Block provisions. In her Decision, the Commissioner discussed the different points of view presented on these issues, and explained in some detail the reasons for her decisions, including the resultant benefits to policyholders.

Where the Commissioner had the discretionary authority to determine whether JHM's proposed Plan provided policyholders with appropriate compensation and where that decision was supported by substantial evidence, this Court may not substitute its judgment for that of the Commissioner.

The Commissioner's Decision was supported by substantial evidence, was warranted by the facts presented to and found by her, and was neither based on an error of law nor was it arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

The Remaining Counts of the Complaint

Whatever the outcome on Count I, the plaintiffs argue that they nevertheless are entitled to proceed to trial on the remaining counts against the Hancock defendants. These are the claims for breach of contract, breach of

fiduciary duty and violation of G.L.c. 93A. This Court disagrees.

Before reaching the issues argued as to these counts, the Court pauses to discuss a procedural nuance. The Hancock defendants have moved to dismiss these counts pursuant to Mass.R.Civ.P. Rule 12(b)(1) and (6). In considering their motion, this Court places substantial reliance upon its own determination of Count I, after its judicial review of the administrative record under G.L.c. 30A, § 14(7), pursuant to Mass.R.Civ.P. Rule 12(c). Whether that reliance, at least for Rule 12(b)(6) purposes, requires treating the Hancock defendants' motion to dismiss as one for summary judgment under Rule 56 is not entirely clear. *See*, e.g., *Watros v. Greater Lynn Mental Health & Retardation Association, Inc.*, 421 Mass. 106, 108-09, 653 N.E.2d 589 (1995). Nor, however, to this Court does it seem of much moment. Certainly, the parties here were not taken by surprise with the Hancock defendants' contentions that the determination of Count I in the Commissioner's and their favor would have a dismissing effect on the remaining counts. Neither at the oral arguments on November 21, 2000, nor at any time since, have the plaintiffs raised any procedural or other issues suggesting that they needed or required any additional opportunity to present material of a different nature should this Court's actions result in the Hancock defendants' motion to dismiss being disposed of under Rule 56 rather than Rule 12(b)(6). Consequently, this Court sees no need for any further notification of its intent to do so. *See*, e.g., *Gomes v. Metropolitan Property & Casualty Insurance Company*, 45 Mass.App.Ct. 27, 32, 695 N.E.2d 673 (1998).

The Court, therefore, turns now to the substance of the motion.

In general, it is too late to raise a claim before a reviewing Court if the point was not raised before the administrative agency. *See McCormick v. Labor Relations Comm'n,* 412 Mass. 164, 170, 588 N.E.2d 1 (1992); *Albert v. Municipal Court,* 388 Mass. 491, 493, 446 N.E.2d 1385 (1983); *Gordon & Son, Inc. v. Alcoholic Beverages Control Commission,* 386 Mass. 64, 69, 434 N.E.2d 986 (1982). The plaintiffs do not deny a failure to present to the Commissioner claims that the Plan breached JHM's Charter or policyholders' contracts, that JHM's management breached their fiduciary duties, or that management's devising and implementing the Plan violated c. 93A.

Here, in any event, the Commissioner already has addressed essentially all of the issues raised in the additional counts. The breach of contract counts are based on plaintiffs' allegations that (1) because the JHM Charter did not authorize a conversion from a mutual insurance company to a publicly held corporation, the Plan breached JHM's Charter and failed to protect policyholders' contractual ownership rights, and (2) the Closed Block arrangement failed to compensate policyholders adequately for their interests in JHM. Similarly, the claims for breach of fiduciary duty and violation of c. 93A are grounded on plaintiffs' same charges that the conversion violated the Charter and that the "historic plus" formula and Closed Block arrangements deprived policyholders of adequate compensation for their interests in JHM. The claims in Counts II through X are really nothing more than indirect challenges to the Commissioner's Decision.

Each of these underlying claims was considered and rejected by the Commissioner; each was discussed in some detail in her Decision; and the Commissioner's actions have now been found appropriate by this Court. Where reasonable minds differ as to the action an agency should take, the Court must defer to the informed judgment and experience of the agency. *See Massachusetts General Hospital v. Weiner,* 569 F.2d 1156, 1159 (1st Cir.1978).

It is not "a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of the evil sought to be corrected." *Id.* For this reason, the legislature relies on the expert's familiarity with industry conditions. *Id.* Here, there is no question that the conversion statute raised significant issues of fairness that required a careful balance of competing interests. "The historical conflict in demutualization has been the competing interests of the current management, or 'insiders,' and the interests of the policyholders." Arthur J. Chartrand, Associate Counsel, National Association of Insurance Commissioners, *Demutualization* 3 (1985).

> Conversion, however, is not an easy process. There is a practical and almost inherent conflict of interest between the mutual company and its management, and the rights and interests of the policyholders themselves. Balancing the interests of the company with fair and equitable treatment to all policyholders while controlling any overreaching or undue advantage by management or third parties is at the crux of the problem.

Id.

Chartrand makes it clear that, in the demutualization process, there is no consensus on how companies are to be

valued or how the allocation to policyholders is to be made. He suggests, however, that "if disinterested third parties come up with a figure they think is fair, the commissioner agrees, and the policyholders by super-majority vote agree, a fair result, while not guaranteed, may be achievable." *Id.*

Here, the Commissioner was assisted in her evaluation of the Plan by outside independent actuarial, accounting, financial, and legal consultants, each of high repute. Her process complied with the statutory requirements of proper notice, a public hearing, and a special vote open to all policyholders. The policyholders who voted approved the Plan by more than 93%.

Thus, because all of the arguments underlying the claims against the Hancock defendants were addressed by the Commissioner's decision, and because the Commissioner properly acted in rejecting those arguments, the claims against the Hancock defendants may not be subject to further judicial review. *See*, e.g., *Harhen v. Brown,* 431 Mass. 838, 848, 730 N.E.2d 859 (2000) (in shareholders' derivative action, management is entitled to the protection of business judgment rule in absence of any allegation of bad faith).

The Hancock defendants converted JHM from a privately held mutual insurance company to a publicly traded stock company. The law of Massachusetts permitted that conversion, provided that the Plan be approved by the Commissioner of Insurance pursuant to G.L. 175, § 19E. This Court has found that the Commissioner properly approved of the Plan. Further, over 93% of the voting policyholders also approved of the Plan. In connection with this Commissioner-approved conversion, it cannot then be said that the Hancock defendants breached

contractual obligations or fiduciary duties,[9] violated G.L. 175, § 19E, or committed unfair and deceptive acts or practices prohibited by G.L.c. 93A.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that plaintiffs' motion for judgment on the pleadings is *DENIED* and defendants' motion for judgment on the pleadings is *ALLOWED*. Further, the Hancock defendants' motion to dismiss, treated as a motion for summary judgment because of the Court's reliance upon its own rulings on Count I, is also *ALLOWED*. Judgment is to enter accordingly.

[9] Count VIII also suffers from a failure to satisfy the special pleading requirements for a derivative claim under Mass.R.Civ.P. Rule 23.1.